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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 992

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,
vs.
EUGENE LUDWIG, as Guardian of the Estate of
Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of
Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of
John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO.,
a Michigan Corporation, as Subrogee of
John Zatek, Cause No. 22025,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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(Figures designated App. 1, *et seq.*, refer to Appendix pages in this Petition. Figures (b) and (c) refer to pages of Petitioner's Appendices used in the Court below. Nine copies of Petitioner's Appendix with pages marked (b) were heretofore furnished this Court under Docket No. 551, October term, 1964, and an additional seven copies are filed herewith. Nine copies of Petitioner's Appendix pages marked (c) are filed herewith.

Petitioner, The Chesapeake and Ohio Railway Company, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on December 10, 1965.

OPINIONS BELOW

The First Opinion of the United States District Court is printed as Appendix "B", *infra*, and is reported at 229 F. Supp. 61. The first Opinion of the Court of Appeals is printed as Appendix "C", *infra*, and is reported at 333 F. 2d 621. The second Opinion of the United States District Court on Petitioner's Motion for New Trial is printed as Appendix "E", *infra*, and is not yet reported.. The second Opinion of the Court of Appeals affirming the judgments of the United States District Court on Motion for New Trial is printed as Appendix "F", *infra*, and is not yet reported.

JURISDICTION

Final judgment of the Court of Appeals for the Sixth Circuit was entered on December 10, 1965 (Appendix "F", *infra*) affirming judgments entered by the United States District Court on April 19, 1965 and denying Petitioner's Motion for New Trial.

The jurisdiction of this Court is invoked under 28 U.S. C.A. §1254(1).

The jurisdiction of the District Court was invoked under 28 U.S.C.A. §1332(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are pertinent:

Fifth Amendment to the Constitution of the United States, set forth in Appendix H, *infra.*

Seventh Amendment to the Constitution of the United States, set forth in Appendix J, *infra.*

Fourteenth Amendment to the Constitution of the United States, set forth in Appendix I, *infra.*

28 U.S.C.A. §1254(1), set forth in Appendix G, *infra.*

28 U.S.C.A. §1652, set forth in Appendix K, *infra.*

28 U.S.C.A. §1332(a)(1), set forth in Appendix "L", *infra.*

QUESTIONS PRESENTED

1. Where the Court of Appeals, after submission of the case, takes judicial notice of certain material facts essential to its decision without any party requesting the District Court or Court of Appeals to take judicial notice of said facts as a substitute for proofs of the facts, and where the facts thus noticed and the inferences drawn therefrom by the Court of Appeals support a new theory of recovery contrary to the allegations of Respondents' complaint, contrary to the theory asserted during trial, and contrary to

the theories presented to the jury, has Petitioner been deprived of one of the elements of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States on the grounds that Petitioner had not been confronted in the District Court, or at any time, with the theory of recovery permitted by the Court of Appeals and had been deprived of the opportunity in the District Court to dispute, with proof, the truth and notoriety of the facts judicially noticed and any inferences to be drawn therefrom?

2. Where the Court of Appeals, after submission of the case, and in lieu of proof in the record, takes judicial notice of certain material facts essential to its decision and from the facts thus judicially noticed and by way of inference draws conclusions of fact to support the verdicts on a theory of recovery which was not presented to the jury, has Petitioner been deprived of its right to a trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States on the grounds that the facts judicially noticed were not presented to the jury; the jury was not permitted to draw its own inferences from the facts judicially noticed; the jury was not instructed on the theory of recovery advanced by the Court of Appeals; and the jury was not given the opportunity to decide whether or not Petitioner was liable to Respondents under the theory advanced by the Court of Appeals?

STATEMENT OF THE CASE

The trial of these consolidated cases took three weeks. The cases have been before the Court of Appeals for the Sixth Circuit on two occasions and, despite this, the gist of Petitioner's present claim is that Petitioner has *never had its day in court.* The mystery of this lamentable situation could aptly be called "The Case of the Unavoidable Yet Avoidable Accident" for Respondents repeatedly admitted that when their automobile stalled on Petitioner's tracks the train was then too close to be able to avoid the accident (2b, 3b, 65b, 66b, 91b), yet the Court of Appeals held the accident and its results might have been avoidable.

This case involves the question of the validity of the action of the Court of Appeals, after the case had been submitted, in supplying proof of a causal connection between the alleged negligence and the accident and results therefrom, to a record otherwise devoid of proof, by taking judicial notice of certain material facts essential to its decision and drawing inferences in favor of Respondents from the facts thus judicially noticed to support a theory of recovery contrary to the allegations in Respondents' complaints when the District Court had not been requested to take judicial notice of these facts in lieu of proof. This case also involves the question of Petitioner being deprived of its right to have all of the facts and inferences to be drawn therefrom, which were advanced by the Court of Appeals to support the judgments, submitted to a jury under proper instructions, rather than to the Court, for final determination.

The unavoidable yet avoidable accident out of which this litigation arose occurred on the clear, sunny afternoon of

June 16, 1961 at about 4:30 p.m., when a second-hand 1958 Chevrolet Station Wagon, owned by John Zatek and being operated in a southerly direction on Middlebelt Road in the City of Livonia, Michigan, by his wife, Lois Jane Zatek, admittedly a new and inexperienced driver, unfamiliar with the operation of the automobile as to its mechanical aspects, stopped upon Petitioner's railroad tracks where it was alleged in the complaints that she was stalled, helplessly disabled and in a position of inextricable peril (App. M, App. 60, 62, 63, 65). In this position the automobile was struck by Petitioner's eastbound 79-car freight train weighing 4136 tons (App. M, App. 69), at a speed of 55 miles per hour at the time of impact (App. M, App. 70, 53b, 54b). As a result of the accident the driver Lois Jane Zatek, and two of her minor children were killed while a third child was injured.

Separate actions were brought in behalf of all of the occupants of the automobile and also by the father, John Zatek, and his insurance carrier, and progressed in the United States District Court for the Eastern District of Michigan, Southern Division, jurisdiction of that Court being invoked because of diversity of citizenship of the parties. The five actions were consolidated for trial.

Respondents filed complaints alleging multiple grounds of negligence but during trial all claims were specifically abandoned except two which were characterized by the District Court in its instructions to the jury as follows (39c):

> "The only grounds now relied on by Plaintiffs to establish negligence on the part of Defendant, as I have already mentioned, are, first, that the Defendant railroad operated its train at an excessive speed and, second that the engine crew for whose acts the Defendant is responsible failed to keep a proper and adequate lookout for traffic on Middlebelt Road."

Upon submission of the case, the jury promptly found the driver of the automobile negligent but returned verdicts in favor of instant Respondents (Appendix "A", *infra*). Upon motion of Petitioner, the District Court set aside the verdicts and entered judgments, as a matter of law, in favor of Petitioner for reasons stated in its opinion (Appendix "B", *infra*). On appeal the judgments were set aside and the case remanded for entry of judgments on the jury verdicts, the Court of Appeals holding, *inter alia,* as follows (Appendix "C"):

> "We take judicial notice of the fact that a modern automobile can be started and moved its own length in a very few seconds. We also note that any movement of the automobile and any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom."

Subsequently Petitioner filed its Petition for Rehearing in the Court of Appeals which was denied (Appendix "D", *infra*) and upon remand timely moved for a new trial asserting, *inter alia,* the same grounds set forth in this petition, to wit: The action of the Court of Appeals, in taking judicial notice of certain material facts upon which the judgments were allegedly sustainable, deprived Petitioner of one of the elements of "due process of law" and deprived Petitioner of its right to a trial by jury which are guaranteed by the Fifth and Seventh Amendments to the Constitution of the United States. The District Court denied Petitioner's motion on the grounds set forth in its opinion (Appendix "E", *infra).* Upon appeal, the Court of Appeals affirmed the judgment of the District Court (Appendix "F", *infra).*

Petitioner does not challenge the opinion of the Court of Appeals in holding Respondents had made out a submissible case for the jury on one of the two theories of negligence presented in the District Court. However, for overwhelmingly cogent reasons to be subsequently advanced in argument, Petitioner challenges vehemently the propriety, legality, and constitutionality of the ruling of the Court of Appeals, on the record presented in this case, that the alleged "failure to maintain a proper lookout" (the second theory asserted) was a proximate cause of the accident and injuries suffered therefrom.

Material to the precise issue raised by this petition are the following matters which are undisputed and uncontroverted in the record of this case:

1. It was agreed in open court, and the jury was instructed, that the brakes of Petitioner's approaching train were applied in emergency either One Thousand Two Hundred Feet (1200′) west of the crossing as stated by Petitioner's diesel engineer, or Nine Hundred Fifty-four Feet (954′) west of the crossing as calculated by Respondents' expert (95b), and that the train stopped Two Thousand Six Hundred Thirty-two Feet (2632′) east of the crossing (96b). Therefore the minimum stopping distance of Petitioner's train was Three Thousand Five Hundred Eighty-six Feet (3586′).

2. Respondents' theory of facts, based upon testimony most favorable to them (with which Petitioner agrees for the purpose of this Petition), which was consistently maintained throughout the trial (34b, 35b, 53b, 54b, 64b, 65b, 89b, 90b, 91b, 92b, 93b, App. M, App. 70) was that the automobile stalled on the track at the time when Petitioner's train was at

a point Two Thousand Three Hundred Eighty Feet (2380′) from the crossing, at which time the brakes should have been applied.

3. It was repeatedly admitted by Respondents that when the automobile stalled on the crossing the train was then too close to be able to avoid the accident (2b, 3b, 65b, 66b, 91b).

4. If the brakes on Petitioner's train had been applied in emergency Two Thousand Three Hundred Eighty Feet (2380′) from the crossing the automobile would have been struck at a speed of forty (40) miles per hour (App. M, App. 70, 53b, 54b) but when the train brakes were applied One Thousand Two Hundred Feet (1200′) from the crossing, as stated by Petitioner's engineer, the automobile was struck at a speed of fifty-five (55) miles per hour (App. M, App. 70).

5. It was undisputed that the driver of the automobile was a new and inexperienced driver unfamiliar with the operation of the automobile as to its mechanical aspects.

6. The record was completely devoid of any proof that Respondents' automobile, after stalling on Petitioner's tracks, was mechanically capable of being started and moved and that Respondents' driver was sufficiently proficient in operating the automobile to accomplish this goal.

7. The record was completely devoid of any proof that Respondents' driver could ever start and move the automobile regardless of any additional time which might have been afforded.

8. The record was also completely devoid of any proof that the nature of the accident and the nature of the injuries suffered therefrom would have been changed if Respondents' automobile had been struck by Petitioner's 4136-ton train at a speed of forty (40) miles per hour rather than a speed of fifty-five (55) miles per hour.

9. Neither Respondents nor Petitioner requested the Trial Court or the Court of Appeals to take judicial notice that a modern automobile can be started and moved its own length in a very few seconds and that any movement of the automobile and any decrease of the speed or force of the train could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom in lieu of proof of these facts.

10. The District Court was not requested to take judicial notice, nor did it take judicial notice, of the facts referred to in paragraph 9, above, and the jury was not instructed that a verdict could be returned against Petitioner on the judicially noticed facts and inferences to be drawn therefrom or on the theory of recovery advanced by the Court of Appeals.

Notwithstanding the above undisputed and uncontradicted matters in the record and after the case had been submitted, the Court of Appeals supplemented the record by taking judicial notice of the facts referred to in paragraph 9, above, and sustained the jury verdicts on the new theory of proximate cause that a "reasonably careful lookout" would have resulted in an earlier application of the train brakes which, in turn, would have afforded some undetermined additional time for Respondents' driver to start and

move the automobile and that the undetermined additional time thus afforded would have been sufficient to accomplish this purpose in spite of the allegations of Respondents' complaint that the car was stalled, helplessly disabled and in a position of inextricable peril (App. M, App. 68); in spite of Respondents' proofs that the car was stalled on the track (App. M., App. 68) and Respondents' driver could not start it (App. M, App. 68); in spite of the fact that Respondents did not assert this theory of recovery in its Statement of Claim read to the jury by the District Court (72c, 73c); and in spite of the fact that the District Court did not instruct the jury that it could return a verdict on this new theory. The opinion of the Court of Appeals (Appendix "C", *infra*) also encompasses the new theory that the jury could have found, without proof other than judicially noticed facts not presented to it, that the nature of the injuries could have been less fatal, or serious, if Petitioner's 4136-ton train had struck the automobile at a speed of forty (40) miles per hour rather than fifty-five (55) miles per hour, even though the pleadings are devoid of any allegation of negligence on this theory; even though the record is devoid of any proof or claim of recovery on this theory; even though Respondents did not assert this theory of recovery in its Statement of Claim read to the jury by the District Court (72c, 73c); and the instructions to the jury are devoid of any charge permitting the jury to return a verdict on this new theory.

In short, the Court of Appeals sustained the verdicts of the jury which the jury could not have possibly rendered because the facts upon which the Court of Appeals' theory of recovery was based, and the theory itself, were never presented to the jury. The jury could not have drawn the same conclusions as the Court of Appeals for the simple reason that the judicially noticed facts from which the

Court of Appeals drew its conclusions were not before the jury, and, in any event, the jury was not given the opportunity to reach their own conclusions on this matter. Petitioner was not apprised of the theory of recovery allowed by the Court of Appeals until publication of the opinion, and, of course, has never had an opportunity to contest, by proof, the truth and notoriety of the facts judicially noticed or any inferences to be drawn therefrom.

It is possible, of course, that if Respondents had pleaded the new theory advanced by the Court of Appeals and had introduced proofs to support it and the jury had been properly instructed, the jury may have concluded as did the Court of Appeals that there was evidence of negligence for which Petitioner should be held answerable. It is equally possible, however, that the jury, based on all the facts in the case and any additional proofs introduced to support or controvert the new theory, or because it would draw inferences from the established facts different from those of the Court of Appeals, would conclude that Petitioner was not answerable for damages under the new theory of recovery advanced. For these reasons Petitioner seeks review of these questions and an order remanding the case for a new trial to permit Petitioner to exercise its constitutional prerogatives to introduce proofs contesting the truth and notoriety of the facts judicially noticed, and any inferences to be drawn therefrom, and the opportunity to present these facts to the jury so that the jury and not the Court of Appeals can determine whether or not recovery should be permitted on the theory of recovery advanced by the Court of Appeals to sustain the judgments.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals in the instant case has profound and far reaching results which undermine the fundamental rights of all litigants invoking jurisdiction of the Federal Courts, for the decision would permit or deny recovery to any litigant by the unfettered discretionary use of judicial notice to supply facts to a record otherwise devoid of proof of facts, and from the facts thus noticed, permit or deny recovery on a theory not advanced during trial, thereby depriving the litigant or his adversary of the opportunity to be informed of the facts and the theory upon which liability ultimately attaches.

2. The Court of Appeals has decided important questions of federal practice, procedure, and evidence in direct conflict with this Court's decisions, in the following respects:

A. In taking judicial notice of certain material facts essential to its decision after the case had been submitted, the Court of Appeals deprived Petitioner of due process of law under the Fifth Amendment to the Constitution of the United States by preventing Petitioner from introducing proof to contest the truth and notoriety of the facts judicially noticed and inferences to be drawn therefrom, which is in direct conflict with this Court's decisions in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292, and *Garner v. Louisiana,* 368 U.S. 157.

B. In taking judicial notice of certain material facts essential to its decision and from the facts thus

judicially noticed and the inferences to be drawn therefrom, permitting recovery on a theory not advanced in the court below, the Court of Appeals has decided an important federal question contrary to the decision by this Court in *Mountain View Mining and Milling Company v. McFadden,* 180 U.S. 533, *Arkansas v. Kansas & Texas Coal Co.,* 183 U.S. 185, and *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291.

C. Where the Court of Appeals permits recovery on facts not presented in the trial court and on a theory of recovery not asserted in the trial court, and at a stage in the litigation which prevents Petitioner from presenting evidence material to the facts and theory upon which recovery is based, the Court of Appeals has decided a federal question in direct conflict with the opinion of this Court in *Saunders v. Shaw,* 244 U.S. 317 and *Brinkerhoff-Faris Co. v. Hill,* 281 U.S. 673.

D. In taking judicial notice of certain patently disputable material facts essential to its decision after the case had been submitted and without the request of any party, the Court of Appeals has completely disregarded the guide-lines laid down by this Court in *Brown, et al. v. Piper,* 91 U.S. 37, and *Quong Wing v. Kirkendall,* 223 U.S. 59, pertaining to when and under what circumstances judicial notice can be properly taken by a Court.

3. To permit the Court of Appeals, *sua sponte,* to take judicial notice of certain facts and from the facts thus noticed draw inferences therefrom to sustain jury verdicts on a new theory of recovery, deprives Petitioner of its

constitutional right under the Seventh Amendment to the Constitution of the United States to trial by jury, for the facts judicially noticed were not presented to the jury; the jury was not permitted to draw its inferences from the judicially noticed facts; the jury was not informed of the theory of recovery advanced by the Court of Appeals; and the jury was not permitted to decide the ultimate question of whether or not Petitioner was answerable in damages under the judicially noticed facts, the inferences to be drawn therefrom and the theory of recovery asserted. On the contrary, the facts were found by the Court of Appeals; the inferences to be drawn from the facts were drawn by the Court of Appeals; the theory of recovery permitted was framed by the Court of Appeals; and the ultimate determination of Petitioner's liability was decided by the Court of Appeals and not the jury, all of which is in direct conflict with this Court's decision in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364.

4. In permitting recovery under a theory not pleaded or asserted during the trial, the Court of Appeals has departed from the uniform practice followed in other circuits in *Williams v. Pennsylvania Railroad Company*, 313 Fed. 2d 203 (CA-2, 1963), *Union Pacific Railroad Company v. Johnson*, 249 Fed. 2d 674 (CA-9, 1957), *Taylor v. Bennett*, 323 Fed. 2d 607 (CA-7, 1963), *Peters v. Fitzpatrick*, 310 Fed. 2d 704 (CA-7, 1962), and the former practice of the instant Court of Appeals in *In Re Bowling Green Milling Co., Inc. v. U. S.*, 132 Fed. 2d 279, which departure requires the exercise of this Court's supervisory powers to correct the decision in the interests of uniformity of practice.

ARGUMENT

1. **Where the Court of Appeals, after submission of the case, takes judicial notice of certain material facts essential to its decision without any party requesting the District Court or Court of Appeals to take judicial notice of said facts as a substitute for proof of the facts, and where the facts thus noticed and the inferences drawn therefrom by the Court of Appeals support a new theory of recovery contrary to the allegations of Respondents' complaint, contrary to the theory asserted during trial, and contrary to the theories presented to the jury, has Petitioner been deprived of one of the elements of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States on the grounds that Petitioner had not been confronted in the District Court, or at any time, with the theory of recovery permitted by the Court of Appeals and had been deprived of the opportunity in the District Court to dispute, with proof, the truth and notoriety of the facts judicially noticed and any inferences to be drawn therefrom?**

That the doctrine of judicial notice is a well entrenched part of our judicial system is not controverted. The doctrine is based upon obvious reasons of convenience and expediency and operates to save trouble, expense and time which would be lost in establishing, in the ordinary way, *facts which do not admit of contradiction.* "Matters of which the court will take notice are necessarily uniform or fixed and do not depend upon uncertain testimony, for as soon as a matter becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized. The test is whether sufficient notoriety attaches to the facts involved, so as to make it safe and proper to assume its existence without proof." *20 Am. Jur.,* Evidence, §9, p. 50.

The facts which the Court of Appeals took judicial notice of in the instant case are patently disputable. The judicially noticed fact "that a modern automobile can be started and moved its own length in very few seconds" is based upon two premises not shown by the proofs to have existed in this case. First, the judicially noticed facts assume that the automobile is mechanically capable of being started and moved. Second, it assumes that the driver of the car is sufficiently experienced and proficient in operating the automobile to accomplish this end. Neither basic premise is warranted in the instant case for the proofs showed that we are confronted with a second-hand three year old automobile which had stalled on the tracks and could not be started. Secondly, the proofs showed the operator was a new and inexperienced driver unfamiliar with the mechanical aspects of operating the automobile. Even new, modern cars without any history of previous difficulty, and operated by an experienced driver, may stall and resist all efforts to start it for a multitude of reasons, the simplest of which, would be the lack of fuel. Exposure to traveling on modern expressway systems to and from work in our large metropolitan areas will bear witness to the propensity of modern automobiles to stall and not thereafter start for a multitude of reasons.

Taking judicial notice that injuries resulting from being struck by a 4136-ton train at a speed of forty (40) miles per hour would be less than being struck by the same train at fifty-five (55) miles per hour is based upon an equally fallacious assumption, for if there is anything that is notorious it is the common everyday occurrence reported by the Press where simple accidents involving minor forces which apparently leave no signs of injury, cause death a few hours later, while victims of accidents involving spectacular

forces escaped unscathed. The facts judicially noticed by the Court of Appeals in the instant case were patently in the class of facts which should not be judicially noticed by a court and it was error to do so.

Speaking of the propriety of taking judicial notice, this Court said in *Brown, et al. v. Piper,* 91 U.S. 37, at pages 42, 43:

> "This power is to be exercised by the courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

The Court of Appeals for the Second Circuit followed, with approval, *Brown v. Piper, supra,* in *Alvery v. United States,* 302 Fed. 2d 790, where it was stated, at page 794:

> "On fact questions the Court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or capable of *certain verification.*" (Emphasis supplied.)

In the instant case the Court of Appeals did not heed the *caveat* of this Court regarding the propriety of taking judicial notice.

Assuming, *arguendo,* that the facts were of the type which could be properly noticed judicially, we are then faced with the issue of the propriety in taking judicial notice where judicial notice has not been requested. The propriety of taking judicial notice under these circumstances was before this Court in *Quong Wing v. Kirkendall,* 223 U.S. 59. In that case Mr. Justice Holmes, speaking for the Court, said, at pages 63, 64:

> "It may or may not be that if the facts were called to our attention in a proper way the objection would

> prove to be real. But even when called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 227; *South Ottawa v. Perkins*, 94 U.S. 260; *Telfair v. Stead*, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed."

The general rule of law on this subject is well stated in 113 A.L.R. 258, at 260:

> "With respect to facts, as distinguished from laws, the weight of authority supports the view that judicial notice will not be taken on appeal of a fact within the judicial knowledge of the court, which was not called to the attention of the trial court and was not judicially noticed by it. See the note in Ann. Cas. 1914B, 196; 1 Jones, Ev., 2d ed., §474. And see 15 R.C.L., Judicial Notice, §6.
>
> " 'The explanation is that that facts susceptible of notice are nevertheless matters of evidence and an appellate tribunal can only review evidence considered by the court below.' 1 Jones, Ev., 2d ed., §474."

The taking of judicial notice without the request of either party has the effect of placing the Court of Appeals in a

position of a voluntary advocate for the party for whose benefit these judicially noticed facts inure. Advocacy by the court for any party would, of course, be highly improper and is all the more reason for exercising the utmost restraint in taking judicial notice of facts where there is *any* indication that they may be disputable.

In addition to the foregoing, and perhaps more important insofar as the issues here presented are concerned, is the fact that the Court of Appeals took judicial notice after the case had been submitted. As pointed out before, judicial notice was not requested at any stage of the proceedings; nor was it even mentioned in a casual way in any of the arguments below. Petitioner was first apprised of the taking of judicial notice by the Court of Appeals when its opinion (Appendix "C", *Infra*) was filed on June 23, 1964, over four months after the case was submitted. It is obvious, therefore, that Petitioner never had an opportunity to contest the truth and notoriety of the facts judicially noticed by the introduction of proofs or even in argument. Such action is contrary to the decision of this Court in *Ohio Bell Telephone Company v. Public Utilities Commission of Ohio,* 301 U.S. 292. In that case this Court said, at pages 301, 302:

> "* * * Moreover, notice, even when taken has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. Wigmore, Evidence, §2567; 1 Greenleaf, Evidence, 16th ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' Ibid. Cf. *Shapleigh v. Mier,* 299 U.S. 468. Such at least is the general rule, to be adhered to in the absence of exceptional conditions."

* * * * *

> "* * * Even so, to press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

The above case was cited with approval and followed in a more recent decision, *Garner v. Louisana,* 368 U.S. 157, where this Court said, at page 173:

> "* * * There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial.' *Ohio Bell Telephone Co. v. Public Utilities Comm'n,* 301 U.S. 292, 302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

This Court has specifically ruled in *Ohio Bell Telephone Company v. Public Utilities Commission, supra,* and *Garner v. Louisana, supra,* that where judicial notice of facts is properly taken the opponent is not precluded from disputing the matters by evidence if he believes it disputable. Here, Petitioner claimed the judicially noticed facts were disputable at the first opportunity afforded by filing its Petition for Rehearing before the Court of Appeals; again in its Motion for New Trial filed with the District Court; and again on its appeal to the Court of Appeals. Peti-

tioner makes the same assertion here and stands ready to dispute the facts by proof upon a new trial of the case. It is assumed that Respondents will contend, as the District Court observed in its opinion denying Petitioner's Motion for New Trial, that no proof Petitioner could offer at a new trial could overcome the judicially noticed fact that a slower impact force at the time of the accident could have substantially changed the nature of the injuries suffered. Such a conclusion is not valid for, as this Court observed in reversing judgment in *Saunders v. Shaw*, 244 U.S. 317, where the lower court assumed the facts in favor of Respondents appeared to be uncontrovertible so that the granting of a new trial would be "an empty form—a mere concession to technicality," at page 319:

> "It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

In the instant case, therefore, regardless of how anybody may covertly value the merits of Petitioner's future contemplated proofs contesting the truth and notoriety of the facts judicially noticed, "due process" requires that Petitioner should have the opportunity to present its evidence on these points.

In *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, this Court said, at page 681:

> "We are not now concerned with the rights of the plaintiff on the merits, * * *; or with the accuracy of the state court's construction of the statute * * * Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support. * * *"

That Petitioner was deprived of due process in the primary sense in the instant case is obvious. The judicially noticed facts upon which a new theory of recovery was advanced to sustain the jury verdicts first appeared in the decision of the Court of Appeals handed down over four months after the case had been submitted. At this juncture Petitioner was, of course, effectively barred from introducing proofs to meet the judicially noticed facts and new theory of recovery and was, therefore, deprived of due process of law in the primary sense.

It can be assumed that Respondents will oppose Petitioner's position and assert that there was nothing to prevent Petitioner from introducing proofs during the trial that the automobile could not have been moved from the track if additional time had been afforded and that there was nothing to prevent Petitioner from introducing proofs that the results of the accident would have been the same, regardless of whether Petitioner's train was traveling forty miles per hour or fifty-five miles per hour at the time of impact. While this may be academically true, any proofs on these points during trial would have been immaterial, for Respondents had not alleged that the automobile could have been moved nor had they alleged that a lower impact speed would have substantially changed the results of the accident, and Respondents had introduced no proofs on these points. Therefore, there was no reason for Petitioner to introduce proofs on these points any more than there was a need for Petitioner to introduce proofs on the remaining dozen or more allegations of negligence asserted in the complaints which were not supported by proof and were abandoned by Respondents. The law does not require litigants to introduce proof on points not in issue and to do so would not only be immaterial but would be a complete waste of the Court's time.

Contrary to the pronouncements of this Court, the Court of Appeals, in taking judicial notice of the facts referred to in the instant case, changed the theory of recovery from that which was asserted by Respondents in the District Court. It must be noted that in their Complaints Respondents alleged the car was stalled, helplessly disabled and in a position of inextricable peril on Petitioner's track at the time the train was approaching (App. "M", App. 60, 62, 63, 65) and proofs were introduced by Respondents that the car was stalled on the track and could not be started by Respondents' driver (App. "M", App. 68). The District court in its opinion (Appendix "B", *infra*) granting Petitioner's motion for judgments as a matter of law made the following observation of undisputed proofs (App. 18):

> "In the instant case there is no testimony to indicate that Mrs. Zatek [Respondents' driver] would have been able to start her car should additional time have elapsed before the train reached the crossing."

Respondents' statement of their theories of recovery were presented to the District Court and read to the jury. With respect to the alleged negligence in failing to maintain a proper lookout Respondents' statement of claim reads as follows (73c):

> "Plaintiffs further claim that the defendant railroad was negligent in failing to keep a proper (1266) and adequate lookout by the members of the crew on its train, in view of all the conditions which then existed in that area, including the speed of the train."

The Court's instructions to the jury on the theories of recovery which it might consider did not contain an instruction permitting recovery upon a theory that the automobile

could have moved had additional time been afforded, or that a reduction in the impact force of the accident would have lessened the seriousness of the injuries.

The theory of recovery advanced by the Court of Appeals based upon the judicially noticed facts and inferences drawn therefrom rests upon an assumption that Respondents' automobile could have been started and moved and that a lessened impact force would have lessened the seriousness of the injuries, which assumptions are totally without proof. Further argument that the theory of recovery advanced by the Court of Appeals is different from Respondents' theory of recovery in the District is to belabor the obvious. In permitting recovery on a theory different from that relied on during trial, the decision of the Court of Appeals is in direct conflict with this Court's ruling in *Mountain View Mining and Milling Company v. McFadden,* 180 U.S. 533, where the Court said, at page 535:

> "But the Circuit Court could not make plaintiffs' case other than they made it by taking judicial notice of facts which they did not choose to rely on in their pleading."

The decision of the Court of Appeals is also a direct conflict with the ruling of the Court of Appeals for the Second District in *Williams v. Pennsylvania Railroad Company,* 313 Fed. 2d 203 (CA-2, 1963); in conflict with the ruling of the Court of Appeals for the Ninth Circuit in *Union Pacific Railroad Company v. Johnson,* 249 Fed. 2d 674 (CA-9, 1957); in conflict with the ruling of the Court of Appeals in the Seventh Circuit in *Taylor v. Bennett,* 323 Fed. 2d 607 (CA-7, 1963) and *Peters v. Fitzpatrick,* 310 Fed. 2d 704 (CA-7, 1962); and in conflict with its own prior ruling in *In Re Bowling Green Milling Co., Inc. v. U. S.,* 132 Fed. 2d 279, in which case it cited with approval and

followed this Court's decisions in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, supra,* and *Mountain View Mining and Milling Company v. McFadden, supra.* The decision of the Court of Appeals is also in conflict with the general rule as set forth in *31 C.J.S.,* Evidence, §9, n. 88 (2), where it is stated:

> "It is not within the scope of judicial notice principle to take controversial matters out of case and court will not take judicial notice of matters inferentially at variance with pleading."

and *Visayan Refining Co., Inc. v. Standard Transp. Co., et al.,* 17 Fed. 2d 642 where the Court said on page 644:

> "Nor can the Court, by taking judicial notice of facts which are not alleged, change the case from that stated by plaintiff."

2. Where the Court of Appeals, after submission of the case, and in lieu of proof in the record, takes judicial notice of certain material facts essential to its decision and from the facts thus judicially noticed and by way of inference draws conclusions of fact to support the verdicts on a theory of recovery which was not presented to the jury, has Petitioner been deprived of its right to a trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States on the grounds that the facts judicially noticed were not presented to the jury; the jury was not permitted to draw its own inferences from the facts judicially noticed; the jury was not instructed on the theory of recovery advanced by the Court of Appeals; and the jury was not given the opportunity to decide whether or not Petitioner was liable to Respondents under the theory advanced by the Court of Appeals?

Most, if not all, of the material facts pertinent to deciding the issue raised in Petitioner's Question 2 of the questions presented have been fully set forth in Petitioner's Statement of the Case and under argument under Question 1, *supra*. Therefore, for the sake of brevity, Petitioner will only refer to certain controlling facts at this juncture which bear directly on the issue presented under Question 2.

In taking the following judicial notice (Appendix "C", App. 34):

> "We take judicial notice of the fact that a modern automobile can be started and moved its own length in very few seconds. We also note that any movement of the automobile and any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom."

the Court of Appeals acknowledges there was no proof in the record to support the facts judicially noticed for if the record was otherwise there would be no need to take such action. Judicial notice is merely a substitute for the conventional method of taking evidence to establish facts. *Grand Opera Co. v. Twentieth Century-Fox Film Corp.*, 235 Fed. 2d 303 (CA-7, 1956).

It is clear on the record made in the District Court that Respondents could not have recovered under their theory that an alleged failure to maintain a proper lookout was a proximate cause of the accident, for under well settled Michigan law a failure to maintain a proper lookout is never the proximate cause of an accident *unless* it is shown that the maintenance of a proper lookout would have avoided the accident. *Buchthal v. New York Central Railroad Company*, 334 Mich. 556, 55 N.W. 2d 92; *McGuire v. Rabaut*, 354 Mich. 230, 92 N.W. 2d 299. New facts and a new theory were required to sustain any verdict supposedly based upon the so-called "lookout" doctrine. The new facts and new theory were supplied by the Court of Appeals after the case had been submitted.

It is obvious that the facts thus judicially noticed, the inferences drawn therefrom, and the theory of recovery advanced by the Court of Appeals were never presented to the jury for its consideration in determining the ultimate rights of the litigants. A mere glance at Respondents' statement of theories of recovery presented to the District Court and read to the jury (73c) and the District Court's instructions on the theories of recovery (79c) conclusively show that the jury was never instructed that it could return a verdict based on the theory advanced by the Court of Appeals. It can be concluded, therefore, that the jury did not return a verdict based upon the theory advanced

by the Court of Appeals. Had the jury done so it would have been error for juries are not permitted to determine and define issues from the record without specific instructions by the District Court. *Atlantic Coast Line Railroad Company v. Darden,* 216 Fed. 2d 125, 128 (CA-5, 1954).

To enable the Court of Appeals to set aside the judgments entered in favor of Petitioner and reinstate jury verdicts in favor of Respondents it added certain material facts to the record before it by means of judicial notice. Upon the expanded record thus made, the Court of Appeals concluded that a jury question was presented. Specifically, the Court took judicial notice that a modern automobile could be started and moved its own length in a very few seconds and thereafter concluded by way of inference that Respondents' automobile could have been started and moved its own length in a very few seconds, contrary to the pleadings and proof. The Court then noted that any movement of the automobile and any slowing of the train by an earlier application of the brakes *could* have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom.

Under the record supplemented by facts judicially noticed, and the inferences to be drawn therefrom, the Court of Appeals concluded that the new record presented facts from which the jury *could* have found Petitioner negligent under the new theory of recovery and the Court of Appeals necessarily concluded that the jury *would* have found against Petitioner, for if there was any question about what verdict the jury would have returned had it been apprised of the judicially noticed facts and the theory of recovery advanced by the Court of Appeals, the case should have been remanded for a new trial in accordance with Petitioner's motion for new trial. This was not done. It

is amply clear from the opinion of the District Court, which was adopted by the Court of Appeals in denying Petitioner's motion for new trial, where the District Court said (Appendix "E", App. 43):

> "No proofs which the defendant could offer at a new trial would make any difference on this point,"

that both the District Court and the Court of Appeals concluded that the jury would have returned a verdict against Petitioner if the judicially noticed facts and new theory had been presented to it, therefore, the granting of a new trial would have been, "an empty form—a mere concession to technicality." Such a conclusion is erroneous, as this Court noted in *Saunders v. Shaw, supra.*

If we assume, *arguendo,* that the facts judicially noticed were facts which could properly be noticed under the circumstances, the fallacy in reasoning is obvious. The jury could not possibly have permitted recovery on the theory advanced by the Court of Appeals since the facts upon which the theory was based were never presented to the jury. If the facts thus judicially noticed had been presented to the jury for its consideration in determining the ultimate facts in the case, the jury *might* have reached the same conclusion as the Court of Appeals, but, on the other hand, it might have reached a contrary conclusion based upon *all* the facts of the case. For example, if the jury had been apprised of the judicially noticed facts that a modern automobile can be started and moved its own length in a very few seconds, it would not be compelled to conclude, as did the Court of Appeals, that Respondents' automobile could be started and moved its own length in a very few seconds in view of all the other evidence in the case. If the jury had been apprised of the judicially noticed facts that a slower

impact force (40 m.p.h. vs. 55 m.p.h.) *could* have substantially changed the nature of the accident and the nature of the injuries suffered therefrom, the jury *might* have concluded that the injuries suffered *would have* been less severe. On the other hand, the jury *might* have concluded, in view of all the evidence in the case, that the injuries suffered in the accident *would not* have been substantially changed. The important point is that the jury was never given the opportunity to decide these questions.

The right of trial by jury of factual issues is one of the most jealously guarded rights of litigants under the Seventh Amendment to the Constitution of the United States. As this Court said in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, at 383, where it quoted with approval from its former decision in *Barney v. Schmeider,* 9 Wall. 248:

> "But we have never before heard of a case in which the jury were permitted, * * *, to find a verdict for the plaintiff on evidence of which they knew nothing except what is detailed to them in the charge of the Court. It is obvious that if such a verdict can be supported here, * * *, the trial by jury may be preserved in name, but will be destroyed in its essential value, and becomes nothing but the machinery through which the Court exercises the functions of a jury without its responsibility."

In the instant case, as in *Barney v. Schmeider, supra,* the jury knew nothing of the facts relied upon by the Court of Appeals. Here, the jury did not even have the benefit of an instruction by the District Court encompassing the facts and theory relied upon by the Court of Appeals to sustain the verdicts.

As pointed out above, if the jury had been apprised of the facts and theory of recovery relied upon by the Court of Appeals, it may have drawn the same conclusions as the Court of Appeals, but it would not be compelled to do so. The crucial point is that the jury was not given the opportunity to determine the facts, the inferences drawn therefrom, and decide the ultimate issue of the rights of the litigants. Under a similar factual situation, this Court said in *Slocum v. New York Life Ins. Co., supra,* at page 387:

> "It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury. In this particular, we think error has been well assigned."

The Court of Appeals has usurped the fact finding prerogative of the jury for in taking judicial notice of the aforementioned facts, drawing inferences therefrom, and in advancing a theory not presented to the jury in the District Court it has resolved all questions which may have been raised on these factors in favor of Respondents and has reached conclusions from the facts thus noticed in favor of Respondents, thereby depriving Petitioner of its constitutional right to have the jury determine the truth of the facts and to draw its own legitimate inferences therefrom and to ultimately decide the rights of the litigants.

It can be assumed that Respondent will argue that even if the Court of Appeals was in error in holding that the jury verdicts were sustainable under the entire theory or even part of the theory advanced by it, the result was nevertheless correct for the verdicts were sustainable under the remaining theories advanced. Such an argument cannot prevail for it has long been held that where one of several theories of recovery is erroneously submitted to the jury and a general verdict is rendered a new trial must be granted. *Cygan v. Cheseapeake & Ohio Railway Co.*, 291 Fed. 2d 782 (CA 6, 1961). The reason is clear. A general verdict does not reveal the theory of recovery and the recovery may have been bottomed on the theory which was erroneously submitted.

CONCLUSION

For the reason set forth above, and because of the demands of the law and substantial justice, the Petition for a Writ of Certiorari should be granted and the case remanded for a new trial.

Respectfully submitted,

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APPENDIX "A"

JURY VERDICT AT CONCLUSION OF TRIAL

(Figures in parentheses refer to pages of this transcript only)

(1365) The Court: Just stand right there in front of the Clerk's desk, if you please.

We have all 12 jurors present.

The Clerk will take the verdict.

The Clerk of the Court: Members of the jury, have you agreed upon a verdict?

Mr. Duncan: We have, your Honor.

The Clerk of the Court: In Case Number 21992, Teresa Serratoni as administratrix of the estate of Lois Jane Zatek v. The Chesapeake and Ohio Railway Company, for whom do you find?

Mr. Duncan: We find no cause for action in the case of 21992.

The Clerk of the Court: In Case Number 21997, Eugene Ludwig as guardian of the estate of Richard Paul Zatek, a minor, v. Chesapeake and Ohio Railway Company, for whom do you find?

Mr. Duncan: We find in favor of the plaintiff.

The Clerk of the Court: In what amount?

Mr. Duncan: $20,000.00.

The Clerk of the Court: In Case Number 21998, Teresa Serratoni as administratrix of the estate of Joan Ellen Zatek, deceased v. The Chesapeake and Ohio Railway Company, for whom do you find?

(1366) Mr. Duncan: In favor of the plaintiff.

The Clerk of the Court: In what amount?

Mr. Duncan: $13,000.00.

The Clerk of the Court: In Case Number 21999, Teresa Serratoni, administratrix of the estate of John Michael Zatek, deceased v. Chesapeake and Ohio Railway Company, for whom do you find?

Mr. Duncan: In favor of the plaintiff.

The Clerk of the Court: In what amount?

Mr. Duncan: $13,000.00.

The Clerk of the Court: In Case Number 22025, John Zatek and Wolverine Insurance Company, et al. v. The Chesapeake and Ohio Railway Company, for whom did you find?

Mr. Duncan: In favor of the plaintiff.

The Clerk of the Court: In what amount?

Mr. Duncan: $10,000.00.

The Clerk of the Court: Members of the jury harken to your verdicts as the Court will record them.

You say you find a verdict in favor of the defendant and against the plaintiff Teresa Serratoni as administratrix of the estate of Lois Jane Zatek, deceased in Case Number 21992 of no cause of action.

And a verdict in favor of the plaintiff Eugene Ludwig as guardian of the estate of Richard Paul Zatek, (1367) a minor, in Case Number 21997, and against the defendant in the amount of $20,000.00.

And a verdict in favor of the plaintiff Teresa Serratoni, as administratrix of the estate of Joan Ellen Zatek, deceased, in Case Number 21998 and against the defendant in the amount of $13,000.00.

And a verdict in favor of the plaintiff Teresa Serratoni, as administratrix of the estate of John Michael Zatek, deceased, in Case Number 21999 and against the defendant in the amount of $13,000.00.

And a verdict in favor of the plaintiffs John Zatek and Wolverine Insurance Company, et al., in Case Number 22025 and against the defendants in the amount of $10,000.00, so say you all?

The Jury: We do.

The Court: All right, ladies and gentlemen, that completes your service with respect to this case.

I understand this is now the last case for this panel. I have been told just a few minutes ago there will be another jury panel here tomorrow. My recollection is this panel commenced serving in March or thereabouts, and some of you have been in here a few times. I have enjoyed having you here, and I want to thank you for your cooperation in

connection with this case and the other cases you have sat on. I hope you have found this a rich and rewarding experience.

(1368) Thank you very much. You are excused. The court will be in recess.

(Which were all of the testimony taken or proceedings had upon the trial of the foregoing-entitled causes.)

We, Randall A. Matkin and Herman H. Tappert, certify that the foregoing and attached one thousand three hundred sixty-eight (1,368) pages constitutes a full and correct transcript of the testimony taken and proceedings had upon the trial of the foregoing-entitled causes.

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.....

APPENDIX "B"

DECISION OF THE DISTRICT COURT ON DEFENDANT'S MOTION TO SET ASIDE JURY'S VERDICTS AND TO ENTER JUDGMENTS IN FAVOR OF THE DEFENDANT IN FOUR OF THE CONSOLIDATED CASES (Dictated from the Bench) reported at 229 F.S. 61.

FREEMAN, District Judge.

These cases arise out of a railroad grade crossing accident involving one of the defendant's freight trains and a Chevrolet station wagon automobile owned by the plaintiff John Zatek, and are now before the Court on motions of the defendant Chesapeake and Ohio Railway Company to set aside jury verdicts and to enter judgments in favor of defendant in four of the five cases filed as a result of this accident and tried pursuant to an agreed order of consolidation.

The entry of judgment on a verdict of no cause of action in favor of defendant in the other companion case No. 21992 awaits the disposition of these motions.

The accident occurred on June 16, 1961, at about 4:30 P.M. when defendant's eastbound freight train struck the automobile then being driven by Mr. Zatek's wife, Lois Jane Zatek, in a southerly direction on Middlebelt Road, in the City of Livonia, Wayne County, Michigan, which automobile had stalled on the track in the path of defendant's oncoming train. Three small children of Mr. and Mrs. Zatek were also occupants of the car. Mrs. Zatek and two of the children were killed. The other child was injured, and the automobile was demolished. As a result, five separate suits were filed against the railroad by Mr. Zatek and the personal representatives of the estates of the deceased wife and children, and the guardian of the estate of the injured child.

Plaintiffs claimed at the outset of the trial that the railroad was negligent in failing to perform certain alleged duties, and also invoked the doctrines of an extra hazardous crossing and last clear chance, all of which were withdrawn by plaintiffs at the close of their testimony, except the claims that (1) the speed of the train was excessive; and (2) the engine crew failed to keep a proper lookout at the crossing, on which issues the cases were submitted to the jury, together with the issue of contributory neligence based on defendant's claim that Mrs. Zatek, the driver of the car, was guilty of negligence which would bar recovery in her case, and which was also the sole proximate cause of the accident, which would bar recovery in the other cases.

Middlebelt Road at this crossing was a straight, level, paved, 4-lane highway, extending in a north and south direction. Defendant's tracks, consisting of two main lines and three spur tracks, crossed the highway at right angles, and extended straight and almost level both east and west for several miles from the crossing, which was approximately 1½ feet above the level of Middlebelt Road measured from a point about 100 feet north of the crossing. There was a race track on the east side of Middlebelt Road, and a Kroger Company warehouse on the west side of the road, both north of the crossing. There was a Ford Motor Company laboratory and parts depot on the west side of Middlebelt Road south of the crossing. Otherwise, except for a few scattered buildings, the surrounding area for a mile in every direction from the crossing was characterized as "open, pretty much open" by plaintiff's witness Thorne, a Livonia police officer. There was no obstruction to the view of a southbound motorist of trains approaching the crossing from either direction.

This crossing had maximum statutory protection, consisting of flasher lights and bells, with the customary crossbuck "Railroad Crossing" sign, and half-gates which were installed in 1950 pursuant to an order of the Michigan Public Service Commission. The day was bright and warm. Visibility was unusually good at the time of the accident.

The defendant's engine was blowing its whistle and ringing its bell. The protective devices and signals at the crossing were all in good operating condition.

In this setting Mrs. Zatek, with her three children in the car, approached the crossing from the north, and the car stalled on the third set of tracks, which would be the middle set of tracks, in the path of defendant's eastbound freight train, resulting in the disaster already mentioned.

Defendant's motions for directed verdicts, made at the close of plaintiff's proofs, were denied, and were renewed at the close of all the testimony, which motions were then taken under advisement. The jury rendered a verdict of no cause of action in the case for the wrongful death of Mrs. Zatetk, and rendered verdicts in favor of plaintiffs in the other four cases.

The instant motions of defendant to set aside the verdicts in favor of plaintiffs and to enter judgments of no cause of action in all cases followed. Oral arguments were heard on September 24, 1962, and again briefly on this date.

Plaintiffs contend that the issues of (1) whether the speed of the train, or (2) whether the engine crew maintained the required lookout, constituted negligence on the part of the railroad, and the causal connection of such negligence with the accident were questions for the jury, and were properly submitted to the jury.

[1] Defendant contends that, as a matter of law, it was not guilty of negligence on either ground claimed by plaintiffs, and that the negligence of Mrs. Zatek in driving the car was the sole proximate cause of the accident.

In considering and deciding these motions, the evidence and all inferences which may reasonably be drawn therefrom must be viewed in the light most favorable to the plaintiff.

First of all, I will consider the issue of whether the speed of the train, under the circumstances then prevailing, was a question for the jury on the issue of negligence.

In a very fine annotation on this point, cited and referred to by counsel in their brief, and on oral argument, in 154 A.L.R. at page 213, and which appears to be the only annotation in this text that the court has been able to find, the author, at page 213, says:

> "It may be said that the general rule is that the question whether the speed of a train, locomotive or railway car at a highway crossing constitutes negligence depends upon the circumstances of the particular case."

At almost the outset of this annotation, the author says:

> "The recent trend of decisions, however, is to the effect that speed does not constitute negligence, in the absence of a statute or ordinance limiting speed, where adequate warnings of the approach of trains are given to persons using the highways, or where suitable protective measures have been resorted to, and that speed is only material where adequate warnings are not given or such protection is not afforded."

At pages 1390 and 1391 of 74 C.J.S. Railroads §744 the text reads as follows:

> "In the absence of statutory or municipal regulations a railroad company has the right to use its discretion in establishing the speed of its trains; but the mere fact that there is no statutory limitation on the speed of trains through cities does not permit a negligent, excessive rate. Generally no rate of speed consistent with the safety of passengers and freight is negligence per se. However, under the rule of the common law requiring a company to exercise its franchise with due regard to the safety of its passengers and such persons as may travel on a highway crossing its tracks, it is the duty of the company, in establishing the rate of speed at which its trains may be run, and of the trainmen in operating the train, to exercise due regard not only to the safety of passengers, but also to that of all persons in the exercise of ordinary

> care traveling on the highway across its tracks; and whether the rate of speed in any particular case is reasonable or negligent depends on the nature of the crossing and other circumstances of the case."

[2] The law is well settled in Michigan that it would not be negligence for a railroad to operate its trains at a rapid rate of speed through open rural country. See Elias v. Collins, 237 Mich. 175, 211 N.W. 88, 52 A.L.R. 1118; Buchthal v. N.Y.C. R.R. Co., 334 Mich. 556, 55 N.W.2d 92. Also see Penn. R.R. Co. v. Stegaman, a 6th Circuit case, reported in 22 F.2d 69, applying Ohio law; Carter v. Pennsylvania, another 6th Circuit case, reported in 172 F.2d 521, also applying Ohio law; and Plough v. Baltimore & O. R.R., a 2nd Circuit case, reported in 172 F.2d 296, applying New York Law.

In the Buchthal case the train was proceeding at a speed of 80 miles an hour, according to the engineer, and struck plaintiff's automobile at a rural crossing. In that case the court said, at page 562 of the opinion in 334 Mich., at page 95 in 55 N.W.2d:

> "We held that the general rule is that when running through open country the speed of trains is not limited. We cited Robinson v. Flint & P.M. R. Co., 79 Mich. 323, 44 N.W. 779, an early case, where we held that a speed of 60 miles an hour was not evidence of negligence. In Shufelt v. Flint & P.M. R. Co., 96 Mich. 327, at page 329, 55 N.W. 1013, at page 1013, we said: 'Trains are not limited in the rate of speed they may run in the country, and across the public highways, where the travel is limited.'"

[3] It also seems clear, under the law of Michigan, that whether the speed of a train through a village or city may constitute a question for the jury as to the issue of negligence depends upon the circumstances of each case. See Hudson v. G.T.W. R.R., 227 Mich. 1, 198 N.W. 339, and Morgan v. Detroit, J. & C. Ry., 234 Mich. 497, 208 N.W. 434.

The circumstances to be considered on this issue, among others, as set out in the Morgan case, at page 501 of the opinion in 234 Mich. 208 N.W. 434, consists of several factors:

(1) The population of the village or city;

(2) How well the crossings were guarded;

(3) How straight the track was.

(4) How much travel there was in the village or city;

(5) To what extent was the view of the railroad track obstructed.

There is no statutory speed limit on trains in Michigan, and the city of Livonia has not restricted the speed of trains by ordinance.

Defendant's train involved in this incident consisted of 79 freight cars, 61 loaded and 18 empty, a caboose and a 3-unit diesel locomotive, having an over-all length of 3720 feet. The total weight of the train was 4375 tons, according to the defendant, and 4136 tons according to the plaintiffs. The flashing lights, bells and gates at the crossing were automatically actuated by the lead unit of a train at the point of an actuating device attached to the track 3018 feet west of the crossing. The front of the diesel engine stopped 2622 feet east of the crossing after the accident, according to the testimony of plaintiffs' witnesses, There is a delay of 1½ seconds after the train reaches the actuating device in the track before the flasher lights and bells at the crossing start to operate. There is an additional delay of 5 seconds before the gates start to descend, which is in accordance with the regulations of the Michigan Public Service Commission. Eleven seconds is required for the gates to reach a fully horizontal position after they start to descend.

Plaintiffs' expert witness Kurt testified that the ordinary average human reaction time is three-fourths of a second. None of plaintiffs' witnesses saw Mrs. Zatek drive upon

the track where the car stalled; and therefore were unable to say how long the car was on the track when it was struck. Two of these eye witnesses testified that the gates were down and the lights were flashing when they first saw the Zatek car, at which time it was stalled on the track. Another witness saw the car stalled on the track, but has no recollection as to the position of the gates at that time.

Another of plaintiffs' eye witnesses, Jerome Fine, testified that the automobile was standing still on the track when he first observed it, at which time "the gates were coming down," immediately followed by the further answer of the eye witness Fine: "They were a quarter of the way down."

Defendant offered the testimony of two witnesses who saw the accident to the effect that the Zatek car was going very slow as it approached the crossing, and passed under the north gate in a so-called creeping manner as the gate was descending, before stopping on the track. The distance from the gate to the track where the accident happened was 43 feet.

I cannot consider the testimony of defendant's witnesses with respect to this point, because I must weigh the evidence in the light most favorable to the plaintiffs. I merely make a reference to that testimony to indicate that there were other witnesses who claimed to have seen the Zatek car approach the crossing and stop on the track.

Having offered no direct evidence of the movement of the automobile as it approached the crossing, or how long it was on the track before the impact, plaintiffs relied on the time interval of 6½ seconds after the train reached the device for actuating the crossing flashers and gates, 3018 feet west of the crossing, before the gates started to descend, at which time the witness Fine said that Mrs. Zatek was on the track, plus three-fourths of a second reaction time for the engineer to apply the brakes, making a total of 7¼ seconds which elapsed after the train triggered the actuating device, and was some evidence, according to plaintiffs, of the position of the engine when Mrs. Zatek was on

the track, at which time plaintiffs claim the engineer should have applied the brakes.

Plaintiffs' expert witness Simpson testified that if the brakes on the train were applied 1185 feet west of the crossing, as stated by the engineer to one of plaintiffs' witnesses, the speed of the train at that point would have been 62.8 miles per hour; and the stopping distance of the train, after application of the emergency brakes, under those circumstances, would be 3817 feet.

Defendant's answers to plaintiffs' interrogatories state, among other things, that the speed of the train was about 60 miles per hour when the brakes were applied. Plaintiffs' witness Eldridge, an employee of the Ford Company, who testified that he saw the train, as it approached the crossing and the resulting accident, estimated the speed of the train to be 65 miles an hour as it approached the crossing, at which speed the stopping distance of the train, with brakes applied, according to the witness Simpson, would be 4192 feet. The stopping distance of the train, with brakes applied, at 60 miles an hour, would be 3586 feet, according to this same witness.

Plaintiffs offered additional testimony by their expert witness Simpson to the effect that if the train was going 60 miles an hour, which would be 88 feet per second, and the brakes were applied 7.2 seconds after the train reached the device for actuating the flashers and gates, the lead engine of the train would then be 2380 feet west of the crossing when the brakes were so applied, and the train would be going 40 miles an hour at the crossing. The witness Simpson also testified that if the brakes were applied 1185 feet west of the crossing, as stated by the engineer, and if the train was then going 62.8 miles per hour, as calculated by this expert witness, the train would be going 55 miles an hour at the crossing. In any event, if the train was going 60 miles an hour, or 62.8 miles an hour, or 65 miles an hour, when the brakes were applied, as indicated by the testimony most favorable to the plaintiffs, the train would be going at a fairly rapid rate of speed at the crossing.

The flashing lights, bells and gates were installed pursuant to Sec. 22.768 of Michigan Statutes Annotated, Comp. Laws 1948, §469.8, which provides in part as follows:

> "Whenever flashing lights are installed at any crossing and the Michigan public utilities commission shall find it necessary, they shall be so arranged that for every train or switching movement over the crossing, the flashing lights shall be in operation for a period of not less than twenty [20] seconds nor more than sixty [60] seconds in advance of the train movement reaching the nearest established curb line of the highway and the flashing lights shall continue to operate until the train movement has passed the established curb line on the near side of the highway."

I interpret that statute to mean, as I indicated during the trial of the case, that there must be a warning of at least 20 seconds, by flasher lights at the crossing, before the train reaches the crossing, and that the lights are not permitted to be in operating condition, that is, flashing, for more than 60 seconds before the train reaches the crossing, in order to not unduly interfere with the movement of traffic upon the highway.

The flasher lights, bells and gates at this crossing were installed in 1950, pursuant to an order of the Michigan Public Service Commission, as I have already indicated. Subsequently the highway was widened from a 2-lane pavement to a 4-lane pavement in 1954, and the flashing lights and gates were moved to accommodate the change in the width of the highway.

In 1956 two additional spur tracks were installed at the crossing, making a total of 5 tracks which existed on the day of the accident, and the flasher lights and gates were again moved to permit that change of conditions.

In ordering the installation of the gates and flasher lights in 1950, the Michigan Public Service Commission authorized or ordered that the device for actuating the flasher lights and gates be installed 3018 feet west of the crossing. At

that time the average speed of defendant's freight trains over the crossing, as I remember it, was about 50 miles an hour, and the speed of its passenger trains was about 80 miles an hour.

When Middlebelt Road was widened in 1954, and when the additional spur tracks were installed in 1956, and in 1961 at the time of the accident, it is my recollection that the average speed of the defendant's freight trains across this crossing was about 60 miles an hour, and that the average speed of the passenger trains was about 78 miles an hour, or at least somewhat less than 80 miles an hour.

The orders of the Michigan Public Service Commission in 1954 and 1956, when the road was widened and the two spur tracks were installed, expressly provided that except for such changes the terms and provisions of the original order of 1950 were in full force and effect.

It is the contention of the plaintiffs that conditions and circumstances at and near the crossing changed subsequent to 1950. The testimony indicated that the number of vehicles on Middlebelt Road at or near this crossing, in October 1950, for a 24-hour period, was 7056 vehicles. In July 1961, possibly a month or less after the accident, the traffic count at this same point had increased to 27493 vehicles for a 24-hour period. The testimony also showed that the United States census for 1950 indicated the population of the City of Livonia as being 17,534; and the 1960 census indicated the population of the city to be 66,702. The testimony also indicates that the City of Livonia is 6 miles square, which would be 36 square miles.

The plaintiffs argue that the considerable increase in traffic on the highway and the considerable increase in population in the city are circumstances which are, in and of themselves, sufficient to take the issue of speed as a ground of negligence to the jury.

I think I am correct when I say that these circumstances of increased traffic and increased population are the only substantial circumstances upon which the plaintiffs rely

to constitute a jury question as to the speed of the train at the time of the accident. There appear to be no other special circumstances of the nature set forth in the Morgan case. The crossing had the maximum protection; the tracks were straight for several miles in each direction from the crossing; the highway and the tracks were level; there was no obstruction to the view of a southbound motorist of trains approaching from either direction. Furthermore, there is a lack of any evidence as to the concentration of population at or near this crossing. As a matter of fact, the record indicates that the area for a distance of approximately a mile in each direction, according to plaintiffs' witness Thorne, was open except for the race track, the Kroger warehouse, the Ford plant, and a few other scattered buildings mentioned in his testimony. As to the factor of population, I have computed that in an area as large as the City of Livonia, which is 36 square miles, a total population, if evenly distributed, would be an average of 1863 per square mile. This is not a heavy concentration of population. As a matter of fact, the testimony would indicate that the population in the area of the crossing was certainly not heavy.

[4] The court holds that the circumstances relied on by plaintiffs, namely, the factors of increased traffic and increased population subsequent to 1950 are not sufficient to constitute a jury question as to whether the speed of the train at the time of the accident was negligence.

I will now discuss the issue of whether there was any substantial evidence of failure of the engine crew to maintain a proper lookout, and, if so, whether such failure was a proximate cause of the accident. Again, I must consider the evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the plaintiffs. It now seems very clear, and shortly after this case was tried the court concluded, that the lookout issue, under the evidence, should not have been submitted to the jury. As a matter of fact, plaintiffs, in support of their claim in this respect, rely almost entirely on some of the evidence of the witness Eldridge who testified on direct ex-

amination that the speed of the train did not change before the impact, and that the brakes were being applied on the train about two or three seconds after the impact. On cross-examination this witness admitted he was in error in stating that the speed of the train did not change prior to the impact, or at least that his observations in that respect were not proper, as indicated by the following testimony given by this witness on cross-examination:

"Q. You feel that your estimate is accurate, within one mile an hour?

A. No, I dont' think so.

Q. Well, that is what I am asking you, sir, that as you were watching this train approach the crossing, isn't it conceivable that the train's speed could have been reduced some?

A. Possibly.

Q. And you not have been able to appreciate the difference with the naked eye?

A. I could not.

Q. You couldn't fairly say one way or the other, then, as far as your observations are concerned?

A. I could not."

Then, on redirect examination, covering the same matter, the witness Eldridge testified:

"Q. I believe you also said you couldn't tell a slight variation one way or nother. Do you think you could have observed whether there was a large variation in speed as you watched the train approach?

A. A large variation, no.

Q. You could not have told whether there was a large variation in speed while you were watching the train?

A. You mean variation in speed?

Q. Extreme increase in speed greatly, or decrease in speed greatly, while you were watching it; do you think you could tell that?

A. I couldn't, no.

Q. You couldn't?

A. No."

[5] It is the contention of defendant that under the evidence in this case, viewed in the light most favorable to the plaintiffs, that any failure on the part of the crew to maintain a proper lookout could not have been a proximate cause of the accident which occurred. It is settled law in Michigan, and the general rule seems to be, that unless a proper lookout would have enabled the train crew to have avoided the accident, an improper lookout upon the part of the crew is not a proximate cause of the accident. See Buchthal v. N.Y.C. R.R. Co., 334 Mich. 556, 55 N.W.2d 92; also see the case of Markar v. N.Y., etc., R.R., a 2nd Circuit case reported in 77 F.2d 282, 283.

In other words, if the accident would have happened without defendant's negligent act, then such act was not the cause of the accident. See Lekas & Drivas, Inc. v. Goulandris, a 2nd Circuit case, reported in 306 F.2d 426, at page 430, citing 2 Harper and James, The Law of Torts, Sec. 20.2, at page 1114; and The American Law Institute of Torts, Sec. 432, comment "B" and illustrations 1 and 2.

Plaintiffs argue that the train crew's alleged improper lookout substantially contributed to the accident, and consequently was a proximate cause of the accident, and cite Prosser on Torts, 2nd edition, at page 252, in support of their position.

[6] The court has examined this authority, and notes, as Dean Prosser points out, on pages 220 and 221 of his work, that the substantial contribution theory only applies if two causes concur to bring about an event, and either one of them operating alone would have been sufficient to cause a similar result. This is not the instant case, since the alleged improper lookout of the train crew standing alone, without the negligence of Mrs. Zatek, would not have caused the accident and ensuing injury and death. In other words, any improper lookout by the train crew, under the evidence in this case, viewed in the light most favorable to the plaintiffs, was not a substantial factor in causing the accident and the accompanying death and injury.

In this connection it should be pointed out that the jury, by its verdicts, found that Mrs. Zatek was guilty of negligence, which barred recovery in her wrongful death case.

The next step from this holding is to decide whether or not her negligence was the sole proximate cause of the accident. The cases relied on by plaintiffs on this issue are clearly distinguishable from the instant case. Ommen v. G.T. R.R. Co., 204 Mich 392, 169 N.W. 914, did not involve any issue of proximate cause, but only the duty of the railroad as to ringing its bell near the crossing, its duty concerning what speed it could travel over the crossing, and the plaintiff's contributory negligence.

The case of Day v. Pere Marquette R.R. Co., 252 Mich. 589, 233 N.W. 425, involved the precise question of plaintiff's contributory negligence. The court in its opinion indicated that a flagman's action in that he warned the public of a freight train which had just passed, and then walked off to the side of the road to talk to another person, and consequently failed to warn the public of the oncoming passenger train which hit plaintiff, presented questions of fact for the jury.

In Block v. Ann Arbor R.R. Co., 202 Mich. 341, 168 N.W. 526, there was evidence that the train did not slacken its speed until it had practically hit the plaintiff's wagon, and that the train hit the wagon just forward of the hub of the rear wheel. In other words, if the train was going slower, or if the brakes had been applied sooner, plaintiff could have avoided the accident.

In Marcott v. Marq., H. & O. R. Co., 47 Mich. 1, 10 N.W. 53, it appeared that a neighbor could have saved the child who was killed if he had reached him just a little earlier, or if the train had reached the point of injury perhaps two or three seconds later. The same is also true in Huff v. Michigan United Traction Co., 186 Mich. 88, 152 N.W. 936, where it appeared that a slight reduction in the speed would have prevented the accident and would have given the plaintiff a chance to pass across the tracks.

In the case of Hoover v. Detroit, Grand Haven and Milwaukee Railroad, 188 Mich. 313, 154 N.W. 94, the court held that where the testimony showed the train could not have been stopped to avoid the accident after the children appeared on the track, it was not error to direct a verdict for the defendant.

[7] In the instant case there is no testimony to indicate that Mrs. Zatek would have been able to start her car should additional time have elapsed before the train reached the crossing. There is no evidence that she was making any effort to get out of the car. As a matter of fact, the testimony all indicated, by witnesses testifying for both parties, that she was trying to get the car started. It should also be noted in this respect that Mrs. Zatek, as I recall the testimony, was a new driver. She had only a temporary driving permit, and her driver's license was received at her home after her death. This may have been a significant factor. In any event, if the speed of the train, under the circumstances here, was not a question for the jury, on the issue of negligence, then the issue of failing to maintain a proper lookout as constituting negligence would be of no consequence, because if the speed of the train, under the circumstances, was not a triable issue for the jury to decide, then the negligence of Mrs. Zatek was clearly the sole proximate cause of the accident.

Reverting briefly to the speed issue, this court directs attention to three decisions: the case of Markar v. New York, etc. R.R., a 2nd Circuit case, reported in 77 F.2d 282, 283; the case of Engberg v. G.N. Ry. Co., 207 Minn. 194, 290 N.W. 579, which case was the subject of the annotation in 154 A.L.R. 206; and the case of Conner v. Penn. R.R., an Eastern District of Pennsylvania case, reported in 163 F. Supp. 718. These cases all held that where a crossing is guarded by automatic signalling devices, and these devices were properly operating at the time of the accident, it was not negligence as a matter of law for a railroad to run its trains at speeds of 50 or 60 miles an hour over such guarded crossing. The opinion of the 2nd Circuit in the Markar case is almost identical in all ma-

terial aspects with the instant case. In that case the accident happened at a crossing guarded by automatic signalling devices, located on a much traveled highway, in a Connecticut town. The evidence also disclosed that the signalling devices were installed pursuant to orders of the Connecticut Public Service Commission, that the speed of the train was 60 miles an hour, and that there was no restrictive order against such speed by any state or municipal authority. The Markar case is the closest case on the facts to the instant case that counsel have cited or that the court has been able to find by independent research.

Other cases cited by plaintiffs in support of these issues are and can be distinguished. I shall not take the time to do it, but I refer specifically to the Morgan case, 234 Mich. 497, 208 N.W. 434; Vernick v. Detroit, etc., R.R. 224 Mich. 321, 194 N.W. 992; Tobias v. M.C. R.R. Co., 103 Mich. 330, 61 N.W. 514; Coston v. Ann Arbor Ry. Co., 201 Mich. 232, 167 N.W. 940; Guggenheim v. Lake Shore Railroad, 66 Mich. 150, 33 N.W. 161; and Ommen v. G. T. W. R.R., 204 Mich. 392, 169 N.W. 914.

Furthermore, the two cases cited by plaintiffs in their supplemental brief filed recently, with respect to the issues of lookout and proximate cause, are of no particular consequence, especially when considered in the light of the facts of this case. Neither case was a railroad case, and the facts were so different that they are of no consequence to the decision of the issues here involved.

Before concluding I desire to comment briefly on the case of Perch v. N.Y.C. R.R. Co., 294 Mich. 227, 293 N.W. 778, upon which the defendant relies so heavily. This court feels that that case turns on the issue of proximate cause, and not on the question of the duty of a railroad regarding the speed of its train at a protected crossing. In that case the vehicle of plaintiff's decedent had come to a stop in front of the crossing when another vehicle hit the car of the plaintiff's decedent in the back and pushed it onto the track, and it was then struck by defendant's train which was admittedly proceeding at a speed in violation of a local

ordinance, killing the plaintiff's decedent. The court, on rehearing, in a 5-to-3 opinion, held that the defendant's negligence in speeding was not a proximate cause of the accident, and that the sole proximate cause was the negligence of the other car in pushing the car of the plaintiff's decedent onto the track.

In the instant case, however, the same principle of proximate cause applies, since the train, as a matter of law, was not operating at a negligent speed under all the circumstances, as this court concludes, and also because the accident would have occurred regardless of the lookout maintained by the engine crew. In other words, the sole proximate cause of the instant accident was the negligence of Mrs. Zatek. And for a case involving these principles, and holding to that effect, see Pitcairn v. Brandes, a 6th Circuit case, reported in 87 F.2d 928, in which this court was involved as a practicing attorney.

There is one other thing I should say before closing, with respect to the lookout issue. As I have already indicated, the only testimony relied on by the plaintiffs in support of that claim is the testimony of the witness Eldridge, who did give testimony to the effect that the train did not slow down before the accident, and that the brakes were applied after the accident; he said "two or three seconds after the accident." It is inconceivable to this court that any witness, standing at a distance from the railroad, could testify to the application of the brakes on the train. This witness stated nothing from which such a conclusion could be drawn, except that he noticed sparks under the train at the crossing, and he testified that the train did not slow down before the impact, but later admitted both on cross-examination and on re-direct examination that even if the train had slowed down he would not have noticed it. In effect, that was what he said. From that tes- [timony the plaintiffs argue that the trains] having stopped 2632 feet beyond the crossing, that therefore the brakes were applied within that distance; and from that, based on testimony of the expert

witness Simpson, they argue, from the stopping distance of the train within approximately that distance, the speed of the train would have been approximately 50 miles an hour; and had the train been proceeding at that speed, when the engineer should have seen Mrs. Zatek on the track, the train could have been either stopped or substantially stopped before the accident. This involved a complete repudiation of the testimony of the witness Eldridge as to his estimate of the speed of the train as being 65 miles an hour at the crossing. In any event, as I have previously stated, even though the evidence should justify an inference that the train crew did not maintain a proper lookout, and that such failure could have been a proximate cause of the accident, still in view of the holding of this court that the evidence of the speed of the train, viewed in the light most favorable to the plaintiff, and taking into consideration the condition of traffic and population, as I have already discussed, the lookout issue would be of no consequence, since the negligence of Mrs. Zatek in that event would necessarily have been the sole proximate cause of the accident.

I have probably overlooked some matters in dictating this decision from the bench. If so, it has not been intentional. I have spent a great deal of time on these motions. My conclusions are the best that I can do.

Therefore, the motions to set aside verdicts and enter judgments in favor of the defendant, in all five cases, are granted.

Appropriate orders and judgments may be submitted.

APPENDIX "C"

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT REPORTED AT 333 F. 2d 621

EDWARDS, Circuit Judge.

These appeals arise out of a tragic grade crossing accident where a mother and three of her children were in an automobile when it stalled on The Chesapeake & Ohio Railway tracks in the path of an 80-car freight train. The train crushed the car; killed the mother, who was driving; killed two of her children, and injured the third. These suits for wrongful deaths and injury were filed by representatives of the estates of the three deceased persons and the injured minor in the United States District Court for the Eastern District of Michigan, Southern Division, jurisdiction being established by diversity of citizenship.

At trial a Federal court jury in Detroit returned verdicts for the defendant in the driver's case, and for the plaintiffs in the case of the passengers. The jury verdicts for plaintiffs were set aside by the United States District Judge, and judgments non obstante veredicto were entered for defendant. Plaintiffs appealed in all cases, with the children's cases consolidated into one appeal.

The accident occurred at 4:30 p.m. June 16, 1961, on Middle Belt Road at the five-track C & O grade crossing in the City of Livonia. The crossing protection consisted of flasher signals and automatic short-arm gates. The train was a three-engine diesel pulling defendant's daily unscheduled freight train No. 52, consisting of 79 cars and a caboose, and approaching Detroit from the west.

The deceased driver, Mrs. Zatek, and her three children were in a station wagon headed south on Middle Belt Road.

As she approached the crossing an automatic switch, located 3,018 feet west of the crossing, was actuated by the freight engine and the flashers commenced and the gates began to come down. The exact relationship of these events to Mrs. Zatek's progress are in dispute. But three eyewitnesses all indicated that her car passed the gate and came to a stop on the track after the gate had started down.

Testimony also established that Mrs. Zatek and her children remained in the station wagon directly in the path of the oncoming freight train until the crash occurred—a matter of twenty seconds or more.

Witnesses testified that during these intervening seconds, Mrs. Zatek appeared to be turning the ignition key as if to attempt to start the motor; that the car "bucked" or "jerked" but did not move out of position. One witness thought he saw "puffs of exhaust."

A part of this tragic story is undisputed evidence that Mrs. Zatek had been driving an automobile for a period of only two weeks and was driving on a temporary driver's permit at the time of the fatal crash.

Estimates of the speed of the train varied from 55 m.p.h., by the train engineer, to 67 m.p.h., based on computations by plaintiffs' expert witness, a mechanical engineer. An eyewitness to the collision, an automotive test development engineer, testified that the train was going 65 m.p.h. This same witness stated that he did not observe any noticeable deceleration of the train until after the moment of impact.

Plaintiffs' expert witness, however, also testified that he had inspected the tachometer of this train, which kept a running speed tape, and that it showed a speed of 59 m.p.h.

Although the engineer and fireman involved were in the courtroom during the trial, they were not called on to testify by either party. However, plaintiffs' attorney on direct examination elicited the following from the first police officer who reported to the scene:

"Q. Did you ask the engineer what happened?

A. Yes.

Q. Did he make a statement to you as to what occurred?

* * * * *

A. He stated that he whistled at the whistle post, which is approximately 1350 feet west of the intersection, and that he applied full emergency brake while he was about three car lengths east of that whistle post, which would be approximately 1200 feet west of the crossing. The train stopped about a half a mile east of the crossing."

Plaintiffs also presented an expert witness who testified that by his measurements the lead engine stopped 2,632 feet east of and past the intersection, and assuming a 60 m.p.h. speed, he calculated that the brakes had been applied 954 feet west of the crossing.

The evidence disclosed that the train crew on the fatal sunny afternoon had a straight and clear view of the crossing from as far away as 5,000 feet.

The crossing is located in Livonia, Michigan, a suburb adjacent to and northwest of Detroit. In 1960 its population was 66,700, an increase of 49,200 over the 1950 census figure.

The area surrounding the crossing houses a number of industrial and commercial sites, as well as a large residential area one-half mile from the crossing.

A traffic count taken shortly after the accident showed that 27,493 vehicles a day passed over this highway at a point located one-half mile south of this crossing.

In the general area of the crossing are found a grocery warehouse and store, an automotive laboratory, a building supply store, and a feed store. A large racetrack and parking area therefor is nearby, as is an automobile production plant and a large shopping center. Traffic from these sites is serviced by the four-lane highway in ques-

tion. The crossing itself was described by the police officer witness as "pretty much open." On the afternoon of the accident the racetrack was in operation, and witnesses described traffic as "fairly crowded"—"fairly heavy."

Under state regulation the railroad had been required six years before this accident to install automatic short-arm gates and flasher signals at this crossing, in addition to the regular cross-buck railroad crossing signs.

In this case it is undisputed that all the warning and protective devices required by law and specified by the Public Service Commission were operating properly on the date of the fatal accident. This included the air horn on the diesel engine, which all of the witnesses testified to hearing blow.

On these facts the trial judge denied a motion for directed verdicts, holding that there were issues of fact which established jury questions both as to defendant's negligence and the driver's contributory negligence.

He charged the jury to consider the plaintiffs' negligence claims under only two issues:

> "The only grounds now relied on by plaintiffs to establish negligence on the part of the defendant, as I have already mentioned, are, first, that the defendant railroad operated its train at an excessive speed and, second, that the engine crew for whose acts the defendant is responsible failed to keep a proper and adequate lookout for traffic on Middle Belt Road.
>
> "The plaintiffs do not now claim any failure on the part of the defendant railroad in maintaining or operating adequate and required traffic protection devices at the crossing, including the timing of such devices, and, therefore, I instruct you to disregard any testimony with respect thereto.
>
> "There was no statute or city ordinance placing a speed limit on the train involved in this collision on June 16, 1961, but, nevertheless, under the law, the

train must be run at a reasonable speed and with that degree of care and prudence required for the safety of the lives and property of those engaged in the operation of the train by the railroad and also of those persons likely approaching and traveling over the crossing.

"What is a reasonable speed depends on the nature of the crossing and other circumstances of the case. The rate of speed that would be entirely safe under some conditions may, however, be improper under other conditions, and it is for you as judges of the facts to determine whether or not the speed which the train was operated at this crossing was negligent under all the circumstances in this case, such as the nature of this crossing on the day and at the time of this collision, including the length of warning time provided to motorists by the timing pattern or gates and flashers.

"There is a duty on the part of the train crew to keep a proper lookout in the case of an approach to a public crossing. The lookout must be one as is reasonable and proper under all the circumstances involved at the time and place involved, including the speed of the train and such conditions as may then exist at the crossing."

He also charged as to the nature of contributory negligence and its applicability in the driver's case, and its inapplicability under Michigan law to the cases of the minor children passengers.

He also charged that there was no state statute or ordinance of the City of Livonia which imposed a legal speed limit upon defendant's trains at the crossing in question.

As we have noted, the jury returned a verdict for the defendant railroad as to the first case brought by the administratrix of the estate of the deceased driver-mother. It also returned verdicts totaling $56,000 in the children's cases—most of this sum being awarded for the benefit of the seriously injured surviving child.

Subsequently, plaintiffs moved for a new trial in the mother's case, and the defendant moved for judgments non obstante veredicto in the children's cases. As we have noted, the District Judge denied plaintiffs' motion for new trial and granted defendant's motions for judgments non obstante veredicto.

On appeal plaintiffs complain about various provisions in the Judge's charge to the jury, including his recital of the Michigan state statute[1] requiring automobile drivers to stop when a warning signals the approach of a train, and his mention of the fact that there was neither a state nor city speed limit applicable to the crossing in question.

[1] We find no error in these portions of the charge and no prejudicial error in the charge as a whole. Taken as a whole, we believe that it was a statement of the applicable law of the state of Michigan which was fair to both parties.

[2] The jury could have concluded from the facts before it that this unfortunate mother—and brand new driver—become panic-stricken as a result of proximity to the railroad crossing when the bells and flashers were actuated; and failing to stop before the crossing, actually did stop and stall her car squarely upon the defendant's tracks and in the path of the approaching train. We have no doubt that such facts and inferences could properly have convinced the jury that her contributory negligence barred this claim.

The problems posed by the other appeals require somewhat more discussion. Four months after trial the District Judge set the verdicts in the children's cases aside in a careful and lengthy opinion[2] in which he held that his reexamination of the record and the law indicated no negligence on defendant railroad's part as a matter of law.

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[1] Mich. Comp. Laws of 1948, §257.667, Mich. Stats. Anno. §9.2367.

[2] Ludwig v. Chesapeake & Ohio Railway Co. (Serratoni v. Chesapeake & Ohio Railway Co.), 229 F. Supp. 61 (E. D. Mich. 1962).

His opinion recites respectable precedent for his ruling both from Michigan case law and that of other jurisdictions. But our ultimate conclusion is that the weight of authority requires sustaining all of the jury verdicts.

[3, 4] Since the accident happened in Michigan, our primary concern is with Michigan law. Under Michigan law the contributory negligence of the mother-driver cannot be imputed to the children passengers. Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105, 163 A.L.R. 697 (1946).

[5] Further, Michigan law does not favor directed verdicts or judgments entered by the trial judge notwithstanding the verdict of a jury. Justice Cooley enunciated this principle in Detroit & Milwaukee Railroad Co. v. Van Steinburg, 17 Mich. 99, 120: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility." This view has been reiterated and followed many times: Carver v. Detroit & Saline Plank Road Co., 61 Mich. 584, 28 N.W. 721 (1886); Stowell v. Standard Oil Co., 139 Mich. 18, 102 N.W. 227 (1905); Burghardt v. Detroit United Railway, 206 Mich. 545, 173 N.W. 360, 5 A.L.R. 1333 (1919), and reemphasized in recent years; Kaminski v. Grand Trunk Western Railroad Co., 347 Mich. 417, 79 N.W.2d 899 (1956); Ware v. Nelson, 351 Mich. 390, 88 N.W.2d 524 (1958); Patterson v. Pennsylvania Railroad Co., 238 F.2d 645 (C.A. 6, 1956).

In this last case reversing a directed verdict in a Michigan grade crossing accident, Judge Martin quoted Justice Cooley further, and added a comment:

> "[T]he great legal authority said: 'When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of those conclusions has been drawn by the jury. The inferences to be drawn from the evidence must either be certain and incontrovertible, or they cannot be decided upon by the court. Negligence canno be conclusively established by a state of facts upon which fair minded men may well differ.'

> "Some of us have noted a modern tendency—perhaps a growing one— to give mere lip service to these sound principles. Trial by jury is our established constitutional safeguard against assumption of unwarranted judicial authority and should be honored by steadfast observance * * *." Patterson v. Pennsylvania Railroad Co., supra, 238 F.2d at 650.

[6] Finally, in terms of general legal principle. Michigan law requires us, when reviewing the grant of judgment for defendant notwithstanding a jury verdict for the plaintiff, to view the conflicting facts and inferences from the point of view favorable to plaintiff—this being the point of view which was accepted by the jury. Ware v. Nelson, supra; Cabana v. City of Hart, 327 Mich. 287, 42 N.W.2d 97, 19 A.L.R.2d 1333 (1950).

[7] The trial judge submitted this case to the jury on issues of defendant's speed and lookout. As to the first of these issues it should be noted that Michigan is a leading authority in relation to the rule that whether or not the speed of a train was negligent, in view of all the surrounding facts and circumstances, is generally a question for the jury. Holdings to this effect may be found stretching from 1885 down to 1957. They include Klanowski v. Grand Trunk Railway Co., 57 Mich. 525, 24 N.W. 801 (1885); Block v. Ann Arbor Railroad Co., 202 Mich. 341, 168 N.W. 526 (1918); Hudson v. Grand Trunk Western Railway Co., 227 Mich. 1, 198 N.W. 339 (1924); Morgan v. Detroit, Jackson & Chicago Railway Co., 234 Mich. 497, 208 N.W. 434 (1926); and Davis v. New York Central Railroad Co., 348 Mich. 262, 83 N.W. 2d 271 (1957).

In fact, the general rules on this topic, as set forth in several recognized law encyclopedias, cite Michigan case law first in support thereof. Thus, American Jurisprudence relies on the Morgan and Hudson cases, supra, for this proposition :

> "It is generally held that it is for the jury to determine whether or not the speed at which a train was operated was negligent under all the circumstances." 44 Am. Jur. Railroads §456, at 686.

And the American Law Reports Annotated, in an annotation entitled "Negligence—Speed of Train at Crossing" cites the general rule thus:

> "The general rule is that the question whether speed constitutes negligence depends upon all the circumstances of the particular case, and that whether the circumstances of the case establish a negligent rate of speed is a question for the jury." 154 A.L.R. 212, 258, citing: Klanowski v. Grand Trunk Railway Co., supra; Ommen v. Grand Trunk Western Railway Co., 204 Mich. 392, 169 N.W. 914 (1918); Fillingham v. Detroit, Grand Haven & Milwaukee Railway Co., 207 Mich. 644, 175 N.W. 227 (1919); (followed in Stahl v. Michigan Central Railroad Co., 227 Mich. 469, 198 N.W. 881 (1924)); Morgan v. Detroit, Jackson & Chicago Railway Co., supra.

[8] There is, however, a recognized exception to this rule which appears to hold that as a matter of law high speed operation of a train over a rural crossing is not negligence, absent some unusual circumstances. The leading Michigan cases in exemplifying this exception are Buchthal v. New York Central Railroad Co., 334 Mich. 556, 55 N.W.2d 92 (1952); Elias v. Collins, 237 Mich. 175, 211 N.W. 88, 52 A.L.R. 1118 (1926); Shufelt v. Flint & Pere Marquette Railroad Co., 96 Mich. 327, 55 N.W. 1013 (1893), and Robinson v. Flint & Pere Marquette Railroad Co., 79 Mich. 323, 44 N.W. 779 (1890) which the District Judge quoted and relied upon in setting aside these verdicts.

[9] On this record, however, we cannot agree that Buchthal (or like cases) is applicable law. On the view of the facts favorable to plaintiffs, we deal with a train speed of 60 to 70 m.p.h. approaching a crossing over a busy highway in a populous city in a major metropolitan area with traffic problems complicated by near-by plant and racetrack operations. This can hardly be regarded as a rural crossing case. As to the nature of the crossing, we believe there was ample evidence to support the submission of the speed issue to the jury.

A separate issue is posed, however, by those cases relied upon by the District Judge which are cited for the holding that where a railroad has complied with all statutory requirements for warning, then speed of the train is not negligence as a matter of law. Markar v. New York, N.H. & H. R. Co., 77 F. 2d 282 (C.A.2, 1935); Engberg v. Great Northern Railway Co., 207 Minn. 194, 290 N.W. 579, 154 A.L.R. 206 (1940); Conner v. Pennsylvania Railroad Co., 163 F. Supp. 718 (E.D.Pa.1958), aff'd 263 F.2d 944 (C.A. 3, 1959). None of these are Michigan cases. No one of the three cases involved an automobile stalled on the tracks. And in sum total, the three hardly do more than illustrate the facts that on different facts, courts tend to reach different conclusions.

The Engberg case (from Minnesota) parallels the Michigan rural crossing rule which we have just discussed and held not applicable. The Markar case does say that under the facts of that case the speed of the train should not have been submitted to the jury as a negligence question. But the third citation, the Conner case, was a case wherein the Third Circuit affirmed a jury award (for the defendant) specifically approving the trial court instruction which submitted both speed and warning as issues for jury consideration. Connor v. Pennsylvania Railroad Co., supra.

Still dealing with the law of other states, we find many stalled automobile cases holding that the speed of the train is generally a factor for jury consideration under all the circumstances of the case. Herrera v. Southern Pacific Co., 155 Cal. App. 2d 781, 318 P.2d 784 (1957); Florida East Coast Railway Co. v. Schweida, 151 So.2d 665 (Fla. App. 1963); Atlantic Coast Line Railroad Co. v. Parker, 90 Ga. App. 251, 82 S.E.2d 706 (1954); Campbell v. Patton, 227 Md. 125, 175 A.2d 761 (1961); Chicago, Rock Island and Pacific Railroad Co. v. Hugh Breeding, Inc., 232 F.2d 584, 247 F.2d 217 (C.A.10,1957), cert. denied, 355 U.S. 880, 78 S.Ct. 138, 2 L.Ed.2d 107; McVicker v. Chesapeake & Ohio Railway Co., 307 F.2d 501 (C.A.6, 1962).

In the last case Chief Judge Miller dealt with an accident where a truck stalled on an Indiana railroad crossing

in a snow storm. Holding that defendant's compliance with all statutory requirements did not remove speed as a negligence issue from the case,[3] he quoted a United States Supreme Court view:

> "As was said by the Supreme Court in the Grand Trunk Railway Co. case (144 U.S. at p. 417, 12 S.Ct. at p. 682), [Grand Trunk Railway Co. of Canada v. Ives, 144 U.S. 408, 12 S.Ct. 679, 36 L.Ed. 485 (1892)] 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbtirarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. * * * When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.'" McVicker v. Chesapeaake & Ohio Railway Co., supra, 307 F.2d at 504.

The Ives case was concerned with a Michigan grade crossing accident where it was claimed that compliance with all statutorily stipulated duties rendered the railroad free from negligence as a matter of law. This view was rejected by the United States Supreme Court, relying on two old Michigan Supreme Court cases—Freeman v. Duluth S. S. & A. Railway Co., 74 Mich. 86, 41 N.W. 872, 3 L.R.A. 594 (1889) and Guggenheim v. Lake Shore &

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[3] On another ground the case found Plaintiff's recovery was barred by his contributory negligence.

Michigan Southern Railway Co., 66 Mich. 150, 33 N.W. 161 (1887).

Very recently (subsequent to decision by the trial court!) this same rule and these same cases have been reviewed by the Michigan Supreme Court. The court held unanimously on the point in question:

> "Decision in this appeal has required our consideration of the circumstances in which a jury must be allowed to determine performance or breach of a railroad's common law duty of care at grade crossings. The trial judge initially submitted this issue to the jury which found from the evidence that due care required more from the defendant railroad than its mere maintenance of warning devices required by statute; but the judge subsequently concluded in granting defendant judgment *non obstante* that *as a matter of law,* the circumstances disclosed by the evidence did not require of defendant any greater care than mere compliance with statutory requirements. For reasons to be subsequently stated, it is our conclusion that the trial judge was correct initially in submitting the question of defendant's compliance with its common law duty of care for factual determination by the jury and that the jury's finding that defendant had breached such duty was amply suported by the evidence." Emery v. Chesapeake & Ohio Railway Co., 372 Mich. 663, 127 N.W.2d 826 (1964).

We conclude that under Michigan law the trial judge committed no error in submitting the issue of train speed to the jury.

Generally, of course, in these stalled automobile cases the speed of the train is considered in relation to the observation and braking of the train crew. This was the second issue which the trial judge submitted to the jury in the instant case.

On this point the facts in our present case, taken on favorable view to plaintiffs, would establish that the train

as it passed the crossing gate actuation switch 3,000 feet from the crossing was traveling at a speed of 900 to 1,000 feet every ten seconds; that the automobile in which these children were seated was stalled on the tracks for more than two-thirds of that time interval; and that the train traveled over half of the remaining distance of over 2,000 feet with the endangered vehicle in full view before emergency application of the brakes.

Defendant's brief deals with this aspect of the problem thus:

> "Plaintiffs claim that Defendant's engineer should have seen the car and applied the brakes when the train was Two Thousand Three Hundred and Eighty feet (2,380') west of the crossing. This was the theory of the facts which Plaintiffs must adhere to on this appeal. * * * It is undisputed that had the brakes of the train been applied at this point the train would have struck the automobile at a speed of forty (40) miles per hour. If the brakes on the train were applied One Thousand Two Hundred feet (1,200') west of the crossing as stated by the railroad engineer, the authomobile would have been struck while the train was traveling at a speed of fifty-five (55) miles per hour."

[10, 11] Any braking, of course, increased the crucial time interval available to the frantic efforts of the driver to escape. We take judicial notice of the fact that a modern automobile can be started and moved its own length in a very few seconds. We also note that any movement of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and he nature of the injuries suffered therefrom.

By so saying we are not presuming that additional time or lessened force would necessarily have prevented this accident or necessarily have prevented the deaths or injuries here complained of. But by so saying we do reject the invitation to join in holding as a matter of law that

such favorable results of prompt braking were beyond the contemplation of reasonable men under all the facts in the plaintiffs' case.

The three Michigan cases which seem to us closest in point to the instant fact situation pertaining to train crew observation and braking are: Aetna Insurance Co. v. Detroit & Toledo Shore Line Railroad Co., 354 Mich. 580, 93 N.W. 2d 272 (1958); Sutter v. Pere Marquette Railway Co., 230 Mich. 489, 202 N.W. 967 (1925); and Orlowski v. Pere Marquette Railway Co., 222 Mich. 580, 193 N.W. 201 (1923).

None of these are "brown cow" cases. For one thing each was brought by a driver whose conduct (contrary to those cases we currently consider) was subject to attack as causally related to his own predicament. Speed and statutory regulations differed. But in each an automobile was stalled on railroad tracks in front of an onrushing train for an appreciable interval of seconds; in each plaintiff claimed negligence in lookout and braking; in each a verdict for plaintiff was sustained. And we have had cited to us and have been able to find no instance of a stalled automobile-railroad crossing case in Michigan where the negligence claims of a plaintiff were barred from jury consideration as a matter of law, except on grounds of his own contributory negligence.

As we have noted, the children's cases we deal with in appeal No. 15,451 are not subject to this last objection.

The judgment in appeal case No. 15,450 is affirmed.

The judgments in appeal case No. 15,451 are vacated and the case is remanded for entry of judgments in accordance with the jury verdicts.

APPENDIX "D"

ORDER OF COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

No. 15,450
15,451

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERESA SERRATONI, as Administratrix of the Estate of Lois Jane Zatek, Deceased, EUGENE LUDWIG, as Guardian of the Estate of Richard Paul Zatek, a minor, et al.,
Plaintiff and Appellants,
v.
THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a foreign corporation,
Defendant and Appellee.

Before WEICK, Chief Judge; MILLER, CECIL, O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

The petition for rehearing en banc is hereby denied.

Approved for entry

/s/ George Edwards,
United States Circuit Judge.

APPENDIX "E"

DECISION OF TRIAL COURT ON DEFENDANT'S MOTION FOR NEW TRIAL

(Cause Nos. 21997, 21998, 21999, 22025)

Excerpt of proceedings had in the above-entitled matters before the Honorable Ralph M. Freeman, District Judge, at Detroit, Michigan, on Monday, June 14, 1965.

Appearances: Frederick D. Jasmer, Esq., appearing on behalf of the plaintiffs; Robert A. Straub, Esq., James R. Gannon, Esq., apearing on behalf of the Defendant.

Detroit, Michigan,
Monday, June 14, 1965
10:20 o'clock A. M.

The Clerk: Cases No. 21997, 21998, 21999 and 22025, Eugene Ludwig, Teresa Serratoni, John Zatek vs. The Cheseapake and Ohio Railway Company.

The Court: All right; proceed, gentlemen.

Do counsel care to make further oral arguments with respect to these motions?

Mr. Straub: If the Court please, we have covered most everything in the first oral argument or the briefs. I don't think we could add anything to what has already been said, your Honor.

The Court: Do the plaintiffs care to argue the matter orally?

Mr. Jasmer: In that event, your Honor, we will take the same position.

The Court: This is a motion for new trial in civil cases No. 21997, 21998, 21999 and 22025, filed under Rule 59 of the Federal Rules of Civil Procedure. The motion is based on seven grounds.

Oral arguments were had on this motion on May 3, 1965, at which time the Court took the matter under advisement for the filing of briefs, which briefs have been filed, a brief (3) in support of the motion consisting of 37 pages, and a brief in opposition consisting of 29 pages, and the defend-

ant's reply brief consisting of 30 pages. I mention this because I think the briefs were entirely too long.

But nevertheless, I have read and studied the briefs and the authorities cited in the briefs and have conducted independent research as to the applicable law. I regret to say that the plaintiffs' brief cited very few cases to assist the Court, and the briefs were repetitious and—well, I just won't make the comments respecting the briefs that I actually feel.

The first ground of the motion is that the jury verdict was against the weight of the evidence on the issue of negligence. Defendant contends that this Court has already concluded that the weight of the evidence favored the defendant, since the Court granted defendant's motion for a judgment n.o.v.

In support of this contention, defendant cites and relies largely on the case of Hampton v. Magnolia Towing Company, a Fifth Circuit case decided in 1964 and reported at 338 F. 2d 303, which states, among other things:

> "If there was no substantial evidence to support the verdict, then manifestly, the verdict was, in the judge's opinion, against the weight of the evidence."

Thus defendant claims it is "merely asking this court to reaffirm its former opinion that there was insufficient (4) evidence, in the Court's opinion, to sustain the verdicts."

This argument is based on a misreading of the Court's decision granting the n.o.v. judgment. The Court, in granting the judgment, did not base its decision on a lack of substantial evidence to support the jury verdict. Rather, this Court concluded that the legal effect of the evidence as to location and surroundings of the railway crossing where the accident occurred was to constitute the crossing as one in a rural setting, at which the high-speed operation of a train does not raise a question of negligence for the jury under Michigan law. Thus, the Court based its decision on

the legal effect of evidence largely undisputed, and not on any lack of substantial evidence.

The Court of Appeals reversed because it concluded on the basis of the same evidence that the crossing here involved must be considered as a matter of law to be, in effect, an urban crossing, so that under Michigan law the issue of speed as negligence should properly go to the jury.

The crossing here involved was in the City of Livonia, which is geographically a very large area, some parts of which are thickly populated and other areas of which are not. In any event, in view of the nature of the evidence of this particular crossing and certain testimony as to the nature of the development or lack of development of that area, this Court was of the view, considering cases where it appeared (5) similar crossings were involved, that it was, in effect, a rural crossing, or in other words, that Michigan law as to rural crossings did apply.

In the first instance, I left this matter for the jury, and the jury, in view of the evidence, concluded that the defendant was guilty of negligence in operating the train here involved at the speed shown by the evidence and/or that the train crew failed to maintain a proper lookout.

I submitted the case to the jury having in mind that it was a close question in my mind on whether or not the case should go to the jury, but as a rule I have always felt that it is better to let a case go to the jury, and then should I change my mind, I have a right to do that, and should I be reversed, the case can be disposed of without another trial; and that I did in this case.

Despite that, I felt that, in view of certain remarks made here, counsel for the plaintiffs was not quite appreciative of that position and what I did at that time, because he made some remarks here in connection with the motion in the wife's case that I think counsel shouldn't be too proud of having stated. But nevertheless, it is my job to overlook personal attitudes and that sort of thing and do what I think is right.

Now that the Court of Appeals has ruled that the legal effect of the evidence was to constitute the crossing as (6) an urban crossing, it is clear that the issue of speed as negligence was for the jury to decide.

The testimony of plaintiffs' expert, Mr. Simpson, was to the effect that the train was traveling approximately 60 miles an hour approaching the crossing. Defendant apparently does not dispute that the train was going roughly 60 miles an hour. Thus, the question for the jury was whether such a speed was negligence in view of all the surrounding circumstances, which were largely undisputed.

The evidence of the sped of the train, in itself, would suffice to provide substantial evidence of negligence, and this Court cannot say that the jury verdict was against the weight of the evidence. In other words, the evidence in the case provided an adequate basis for a conclusion by the jury that the speed of the train was negligently excessive.

Furthermore, I desire to say that in view of the reasoning of the Court of Appeals with respect to the evidence in this case, and at least one case decided by the Supreme Court of Michigan after this case was submitted to the jury and during the appeal of this case, it convinces me that I believe, in this setting, that I was wrong in setting aside these judgments on the ground of negligence. I have thought a lot about this matter—maybe more so than certain counsel in this case realize. I based my decision, lacking what I considered good applicable authority under Michigan law. I was influenced (7) by a case in the Second Circuit. It was the closest case in point that I could find, and I maybe placed too much reliance on that case.

The Court of Appeals recognized that it was good, pertinent authority, but nevertheless concluded under Michigan law, and especially under more recent Michigan cases, that this case presented a matter on this issue for the jury; and I do not disagree at all with the Court of Appeals in their conclusion. Considering the nature of the cross-

ing, the traffic count, the overall setting of the crossing, being near, I think, the Ford factory had a plant right nearby, the Kohler Company had a large warehouse in the vicinity, the racetrack was not far away, and many people used the road in connection with those enterprises; and considering the whole matter, I believe I was wrong in deciding that this, in effect, was a rural setting, despite the lack of residential development in the immediate vicinity, and I think the Court of Appeals was right. Of course, it doesn't make any difference whether I think they were right or wrong. They are right, but I want to say that I agree entirely with the Court of Appeals that under the evidence here, it presented a situation for applicable Michigan law of a crossing in an urban environment rather than a rural setting.

Secondly, defendant contends in effect that the action of the Court of Appeals in taking judicial notice of the (8) fact that cars can't be started and moved their own length in a very few seconds deprived defendant of a fair trial, since defendant had no opportunity to introduce evidence to rebut the theory of recovery approved by the Court of Appeals. Defendants contend that the theory of recovery pleaded by plaintiffs was that the automobile was unable to get off the tracks, and that the Court of Appeals changed plaintiffs' theory without an amendment to the pleadings, and also supplied the proof to support the new theory by means of judicially noticing a fact.

In the first place, the Court of Appeals did not limit its approval to a single theory of recovery. The Court concluded that the questions of speed and lookout were both properly for the jury. With respect to the theory of failure to maintain a proper lookout, and therefore the failure to apply the brakes sooner, the Court of Appeals stated:

> "Any braking, of course, increased the crucial time interval available to the frantic efforts of the driver to escape. We take judicial notice of the fact that a modern automobile can be started and moved its own length in a very few seconds. We also note that any

movement of the automobile and any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered (9) therefrom.

"By so saying we are not presuming that additional time or lessen force would necessarily have prevented this accident or necessarily have prevented the deaths or injuries here complained of. But by so saying we do reject the invitation to join in holding as a matter of law that such favorable results of prompt braking were beyond the contemplation of reasonable men under all the facts in the plaintiff's case."

It is clear that under the reasoning of the Court of Appeals, the question whether or not the car could get off the tracks was not decisive, since in either event the failure to keep a lookout and brake sooner could be a proximate cause of the accident which actually occurred. If the car could get off the tracks, the defendant might well be found negligent for failure to slow up in order to give the car more time to get off the track. And if the car could not get off the track, the defendant might well be found negligent for failure to slow up in order to lessen the impact, and therefore to reduce the seriousness of the accident.

The basic theory of failure to keep a lookout and therefore failure to brake sooner was pleaded by plaintiff, and the status of the car on the track, whether helpless or movable, was merely evidence in support of that theory of recovery. No new theory of recovery was advanced by the Court (10) of Appeals. This was simply an observation of the Court of Appeals from the evidence in the case.

This Court does not believe that the Court of Appeals was in error in taking judicial notice of the movability of cars. Further, it does not appear that defendant was deprived of the right to introduce evidence at the trial on the movability of the car.

Indeed, if defendant now wishes to contest the observation of the Court of Appeals, then defendant must feel that the car could not have been moved, which is the very position that defendant attributes to plaintiff.

But assuming that the car could not be moved, defendant's failure to keep a lookout or to brake the train sooner might still be a proximate cause of the accident which actually occurred, since, again from the Court of Appeals' opinion, "any decrease of speed or force of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom." No proofs which the defendant could offer at a new trial would make any difference on this point.

Thirdly, the defendant contends the Court erred in giving the following instruction:

> "If you believe that any party to these cases has failed or refused to produce any evidence within his or (11) its possession or control, whether by way of the testimony of witnesses or exhibits, you are authorized under the law to presume that such evidence, if it had been produced, would have been unfavorable to the party who did not present it, the inference being that it would have been detrimental to that party."

The instruction apparently related to defendant's failure to call the train crew and to offer the speed tape showing the speed of the train before the accident. The speed tape was a record belonging to the defendant and in its possession. The train crew members were employees of the defendant, and therefore in its control. They were men who had first-hand knowledge of the accident and who could be expected to be witnesses friendly to the defendant and favorable if possible.

The rule in Michigan, as in many other jurisdictions, is that an adverse inference is warranted where a party fails to call as witnesses persons having knowledge of the facts who are its officers, agents or employees. Leeds v. Masha,

328 Mich. 137; Brandt v. C. F. Smith & Co., 242 Mich. 217; also see 31A C.J.S. Evidence §156(3), page 407, which cites many cases in support of this principle.

In Leeds, which was a suit by a passenger against a taxicab company arising out of an automobile accident involving the cab in which plaintiff was riding, an unfavorable (12) inference was held to arise against the taxicab company for failure to produce as a witness the driver of the cab involved in the accident. In this respect, a taxicab driver is no different than a train engineer. Both are employees of a defendant under its control and having first-hand knowledge of the accident giving rise to the suit.

Furthermore, in Brandt, which was a case where "Defendant's officers and agents were presumably available as witnesses; and even its records doubtless could have been used * * *" to establish a defense, the court held:

> "Failure to produce evidence within a party's control raises the presumption that, if produced, it would operate against him; and every intendment will be in favor of the opposite party."

Thus, under Michigan law stated in Leeds and Brandt, the instruction given in the instant case was proper, as it related both to the train crew and the speed tape not produced by defendant.

Defendant's contention that plaintiff could have called these witnesses or offered this evidence is no answer, since the evidence was particularly within the control of defendant and would most naturally be offered by defendant.

It is true that under Michigan law no unfavorable inference arises from the failure to call a witness equally available to the other party, which the defendant contended in (13) support of this ground of its motion. See Barringer v. Arnold, 358 Mich. 594. But this rule does not apply to employees of one party which are thought to be within the control of that party, as seen from Leeds and Brandt.

The fourth ground of the motion asserted by defendant is the refusal of the Court to instruct the jury as requested by defendant in defendant's requests numbers 24, 26, 29, 47 and 49. I will discuss these requests without reading the—well, I believe I should quote them so that they may be understood with respect to what I have to say about them.

Request No. 24 reads:

> "I charge you that defendant is under no duty to have its train under such control that it might be stopped in order to avoid a collision with an automobile at a public grade crossing."

This request is clearly too broad to be correct, for it implies that even a train which could have been stopped to avoid an accident with a helplessly stalled car on the tracks has no duty to stop in time to avoid the accident. And I should say that I think I assigned this same reason at the time of the trial in ruling upon these requests as I did all of the other requests. But they are raised again and I will try to give my reasons once more for refusing these requests.

Request No. 26 reads:

> "I charge you further that defendant's employees (14) have a right to assume that automobiles on its tracks will heed the warning of the whistle and get off the tracks."

This request also suggests a lower duty of care than is actually placed on the railroad, since it clearly implies that the railroad had no duty to do anything more than sound its whistle to warn a car stalled on the tracks ahead, even though the train could be slowed down or stopped.

In support of request No. 26, defendant cites and relies upon the case of Lake Shore & Michigan Southern Railway Co. v. Miller, 25 Mich. 274, for the proposition that a train

engineer has the right to assume that persons on the tracks ahead will heed the warning whistle and get off. However, the case does not refer to a stalled car but only to teams and carriages or people crossing over the tracks, who are obviously much less likely to be hit by the train.

Further, the case states that the engineer "* * * has the right to go on, without checking his speed, until he sees that the team or the man is not likely to get out of the way, when it would become his duty to give extra alarm by bell or whistle, and if that is not heeded, then, as a last resort, to check his speed or stop his train, if possible, in time to avoid disaster." This language in the cited case is the only language applicable to the situation in the instant case of a car stalled on the tracks, and the language clearly indicates that Michigan law imposes a duty on the train engineer to try (15) to stop his train if possible when it appears likely that the stalled car may not get off the track in time.

The implication of request No. 26 that the train had no duty to stop is therefore erroneous as well as argumentative.

Defendant also argues that instruction 26 was appropriate in view of the observation of the Court of Appeals that a modern automobile may be started and moved its own length in a very few seconds, the argument being that if the car could be moved quicky, there was no reason for the crew to assume that the car would remain on the track, but rather would get off in time.

The argument is a non sequitur. It does not follow from the fact that cars can be started fast that the particular car would necessarily get off the track before the train arrived at the crossing without any reduction in speed. Indeed, as plaintiffs point out, the fact that the car might have been moved in a few seconds is all the more reason why the slowing down of the train was desirable, to give the car precious extra seconds to get off the track.

Request No. 26 was a misleading and argumentative statement and therefore was properly refused.

Requested charge No. 29 reads:

> "I charge you that you cannot find defendant negligent for any failure on the part of its engineer to put (16) the brakes of the train in emergency before he actually did place them in emergency, for there is no duty upon defendant to slacken the speed of its trains until danger is apparent."

The last clause of the charge, that there is no duty to slow down until danger is apparent, would be correct if it included the phrase "or would be apparent to a reasonable man keeping a careful lookout." Otherwise, the last clause would suggest that there was no duty of care to slow down if the train crew was not watching at all, for in that case the danger would not become apparent to the crew until after the accident.

The entire charge as stated is clearly argumentative and erroneous. The instruction amounts to a statement by the Court as a matter of law that the engineer was not negligent in not putting the brakes on sooner. Thus, the instruction unduly invades the province of the jury, and the refusal to give it does not justify a new trial.

Requested charge No. 47 reads:

> "I charge you that the law of the State of Michigan has delegated to the Michigan Public Service Commission police powers over the railroads operating in this State. I charge you further that police powers include the type of protection that should be afforded at a railroad crossing and also the speed at which trains can (17) be operated. I charge you further that there is no evidence that the Michigan Public Service Commission has in any restricted the speed of defendant's trains at Middlebelt Road crossing."

To the extent that charge No. 47 was not merely repetitious as to the police powers of the Michigan Public Service Commission, it is erroneous and misleading. The Court gave defendant's request to charge No. 12, as follows:

> "I charge you as a matter of law that the State legislature has delegated to the State Commission the authority to control the actions of the railroad respecting safety measures at the crossings by way of signs, signals, flashers, gates and the timing thereof, and it is for the Commission and not for the court or jury to prescribe what measures by way of signs and signals the railroad shall take respecting safety at the crossings."

Thus, reference to the powers of the Public Service Commission in request No. 47 was repetitious to the extent that it was accurate. However, request 47 is erroneous and misleading in suggesting that the regulation of the speed of trains has been delegated to the Public Service Commission. The speed of trains is subject to regulation by state statute or municipal ordinance, and not by the Pubic Service Commission, and therefore an instruction that the Commission had not restricted the speed of defendant's train at Middlebelt Road (18) would be seriously misleading.

For these reasons, the Court's refusal to give instruction 47 was not erroneous.

Requested charge No. 49 reads:

> "I charge you that trains are operated at a high rate of speed in accordance with public demand."

This request was properly refused as argumentative. Further, the requested instruction is misleading because it implies that a high speed can never be negligence.

It should be noted that the opinion of the Court of Appeals in this case states:

> "We find * * * no prejudicial error in the charge as a whole. Taken as a whole, we believe that it was a statement of the applicable law of the state of Michigan which was fair to both parties."

The fifth ground of the motion is that the weight of the evidence in the cases of the surviving child and the father

shows that the alleged damages for which the defendant was charged as liable were recoverable at all only in the mother's case. The theory of this ground for a new trial is basically that the present and future expense payable by the father for the child's psychiatric treatments were items of pecuniary loss resulting from the loss of the mother, and therefore recoverable only in the wrongful death action on behalf of the mother's estate. This was a rather ingenious (19) argument.

In the child's case, the Court charged the jury by giving the standard instruction for the elements of a typical personal injury case, including (1) pain and suffering of both body and mind, past, present and future; (2) loss of health and strength, past, present and future; (3) past and future disability; (4) loss of earnings and impaired earning capacity in the future; (5) reasonable and necessary expenses incurred by plaintiff in the past and future in the care and treatment of his injuries after attaining the age of 21.

Defendant contends that the present and future damages of the child consist entirely of an emotional problem resulting primarily, if not entirely from the loss of his mother and the emotional instability of his father. Defendant correctly states that it is not liable for damages resulting from the death of the mother, because the jury found contributory negligence in her wrongful death case.

However, defendant's argument is based on a misconstruction of the testimony of the psychiatrist, Dr. Urie, who examined the child. The doctor diagnosed the child's problem as a gross stress reaction sustained as a result of the accident itself. (See transcript in this case, page 372.) In other words, the combined effect of fright and physical injury consisting of a head injury or concussion at the time of the accident was to leave lasting psychic scars on the personality of this two-year-old child. His participation in the accident (20) brought about the gross stress reaction, which is the name for a condition formerly known as a traumatic neurosis.

The psychiatrist did not testify that the loss of the child's mother or his father's instability fas the cause of his emotional damages, although he did indicate that the absence of a mother figure and the unnaturally dependent relation of the child to his father would also contribute to the disability resulting from the accident itself. At page 383 of the transcript the following testimony clarifies the psychiatrist's position:

> "Q. And do I understand from your testimony, Doctor, that a child at the age this boy was when this happened, two years of age, at that time that he can actually appreciate and know and realize that his entire existence is threatened when this collision occurred?
>
> A. I believe he can.
>
> Q. And this is the source of what is bothering him, isn't it?
>
> A. Yes, I believe so."

The psychiatrist also characterized the gross stress reaction from the accident as a disabling condition, which is very likely to affect the child's life activities, (see transcript page 342), and affect his ability to live a normal life (transcript 347).

The clear thrust of the psychiatrist's testimony, (21) considered as a whole, was that the child suffered a serious and lasting emotional injury as a result of the accident. Therefore, defendant cannot escape liability by claiming that the loss of the mother or the father's instability is the cause of the child's condition. The child was entitled to bring an action on his own behalf for the injuries he himself suffered, both present and future, and therefore the standard instruction given by the Court as to damages recoverable if proved was a proper instruction.

Plaintiff in that case was not seeking items of pecuniary loss as a result of the mother's death in the child's case, but rather items of damage resulting from the injuries to the child himself at the time of the accident. Therefore,

there is no merit to defendant's argument that the present and future damages to the child were recoverable only in the mother's case.

Likewise in the father's case, the future medical expense for the child for psychiatric treatment as a result of the accident is not an item of pecuniary loss resulting from the death of the mother, although the mother's death is a complicating factor in the disability. Since the child's emotional disability, according to the phychiatrist, is a result of the accident itself, the items of present and future damage are recoverable if proved in the child's and father's cases and not in the mother's case.

(22) Defendant contends in its reply brief that the child cannot recover for purely emotional harm under Michigan law, citing the case of Miller v. Michigan Central Railroad, 167 Mich. 21. This argument overlooks the fact that the child suffered a concussion from a blow to his head at the time of the accident. The rule in Michigan is that emotional harm is compensable as an element of damages if "accompanied with physical injury." See Alexander v. Pacholek, 222 Mich. 157.

For example, in the case of Main v. Railway, 207 Mich. 473, it was recognized that plaintiff could recover for emotional distress for as long a period as it was provable where plaintiff also suffered physical injury consisting of a scar on her face as a result of a train accident.

Likewise in this case, where plaintiff received physical injury in a train accident, the accompanying emotional harm was compensable.

The sixth ground of the motion in the cases of the surviving child and the father is that the proofs were legally insufficient to establish present and future damages. In other words, the present and future emotional harm to the child was not established to a reasonable certainty as Michigan law requires.

Defendant correctly contends that the future damages must be established with reasonable certainty. As the

court stated in the case of Kellom v. City of Ecorse, (23) 329 Mich. 303, at page 308:

> "It is the generally accepted rule that to entitle a plaintiff to recover damages presently for apprehended future consequences of an injury, there must be such a degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury."

The Court so instructed the jury in the instant case, almost in the precise language of that case.

Defendant's position is, in effect, that the psychiatrist's testimony was insufficiently certain of future damages to susatin a verdict on that basis. This position finds support in the sometimes qualified language of the psychiatrist, as for example when he was asked whether the disabling condition would affect the child's ability to live a normal life (transcript 247), he replied that it certainly could, but did not say that it would. However, other testimony of the psychiatrist indicated a reasonable medical certainty on his part that the child would have future emotional disability. The most important testimony in this regard occurred on pages 374 and 375 of the transcript on cross-examination, in part which reads as follows:

> "Q. And of all the things you have seen that could conceivably happen, he may want to talk about this accident in later life, if he remembers it, or he may have feeling (24) of some insecurity because his mother is gone, that is the disability you are speaking of and which you have classified as ten per cent?
>
> A. That is an emotional disability?
>
> Q. Whether or not that emotional disability will be present in the future is something you can't say with any degree of certainty at this time, is it?
>
> A. As certain as I can professionally.
>
> Q. Then, you think, as a psychiatrist, he is certain to have some of these matters arise later in life?
>
> A. I would say so."

This testimony established the future emotional disability to a reasonable certainty, medically speaking, by a preponderance of the evidence, which is the proper test of proof in a civil case. Thus, in the child's case the proofs were sufficient to support a jury verdict for future damages.

Likewise, in the father's case future medical expenses were established to a reasonable certainty, the psychiatrist having estimated the cost of necessary treatments at $7,800.

Thus, the proofs were sufficient to support jury verdicts including future damages.

The seventh and final ground of the motion is that the verdicts were excessive in view of the evidence, and in the two minor death cases the defendant contends that the (25) jury must have acted arbitrarily and caprciously. Defendant argues that since the jury returned a verdict of $13,000 in each of the minor death cases, even though one of the minor children was three years older than the other, the jury must have acted arbitrarily in fixing the amount of damages in both cases at the same amount. Defendant's argument is, in effect, that since the cost of raising the children was $750 a year, as shown by the evidence, the verdict in the two cases should have differed by at least $2,250.

However, defendant does not object to the charge of the Court on damages in the minor death cases. This charge states that the pecuniary injury to the father included the reasonable value of the loss of the companionship of the children as well as the value of services rendered by the children. It was clearly within the jury's discretion to evaluate these elements of damages in such a way that they would conclude that the verdict should be an equal amount in each case.

As for defendant's contention that the verdict were excessive, the Sixth Circuit Court of Appeals stated in the case of Collins v. Clayton & Lambert Manufacturing Company, reported in 299 F.2d 362:

> "Under the practice generally, courts are reluctant to overturn jury verdicts on the grounds that they are excessive. The circumstances must be clear and (26) plain in showing that the jury was influenced by improper motive and not simply because the amount given appears to be too much."

Furthermore, in Jenkins v. Associated Transport, Inc., a Sixth Circuit case decided in 1964 and reported in 330 F.2d 706, the Court held that the jury's decision as to the award of damages was not subject to interference by the trial judge "unless so excessive * * * as to be indicative of prejudice, passion, partiality or corruption on the part of the jury * * * or upon a consideration of elements not within the scope of the action."

The Court sees no such indication in the instant case.

All of the grounds asserted in support of this motion for a new trial having been found without merit, the motion is denied.

Now, plaintiff in their reply brief contends that the motion for a new trial in dilatory and brought in bad faith as part of a planned campaign of delay and harassment. Although this Court agrees with the plaintiff that the better practice would have been to file the motion for a new trial at the same time as the motion for a judgment n.o.v., there does not appear to be any authority that the motion was waived by not filing it at that time. The delay is unfortunate, but the motion having already been denied on the merits; the delay and (27) any bad faith involved will not be assigned as a reason for denying the motion.

An appropriate order may be submitted.

* * * * *

(certificate of Court Reporter attached)

APPENDIX "F"

ORDER OF COURT OF APPEALS AFFIRMING JUDGMENTS OF DISTRICT COURT

(Filed December 10, 1965)

Before Weick, Chief Judge, Phillips and Edwards, Circuit Judges.

In the first appeal of these cases we held that the evidence was sufficient to require submission of the issue of negligence to the jury. We vacated the judgments and remanded for entry of judgments in accordance with the jury's verdicts. 333 F.2d 621 (1964) cert. denied 379 U.S. 960.

Following the remand the District Judge entered judgments on the verdicts. Motions for a new trial were then filed and denied by District Judge Freeman in a well considered opinion. We are in full agreement with Judge Freeman's opinion, which we think adequately and correctly disposes of all issues properly raised in the present appeal.

The judgments are affirmed.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX "G"

28 U.S.C.A. §1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * * * *

APPENDIX "H"

U.S.C.A. CONST. AMEND. 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX "I"

U.S.C.A. CONST. AMEND. 14, §1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "J"

U.S.C.A. CONST. AMEND. 7

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX "K"

28 U.S.C.A. §1652

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 63 Stat. 944.

APPENDIX "L"

28 U.S.C.A. §1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

* * * * *

APPENDIX "M"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

JOHN ZATEK, as guardian of the Estate of Richard Paul Zatek, a minor, Plaintiff. v. THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a foreign corporation, Defendant.	Civil Action No. 21,997

COMPLAINT

(Filed December 15, 1961)

(Specimen of all Cases)

Now comes John Zatek, as guardian of the Estate of Richard Paul Zatek, a minor, by Cassese, Batchelder, Jasmer & Evanski, his attorneys, states as follows:

COUNT I

1. That he is the duly qualified and acting guardian of the Estate of Richard Paul Zatek, a minor, having been appointed by the Probate Court for the County of Wayne, State of Michigan, on December 6, 1961 in Case Number 504,361; that he is a resident and citizen of Garden City, County of Wayne and State of Michigan; that the defendant is a railroad corporation organized and existing under the laws of a foreign state, and not a citizen of Michigan, with railroad tracks running into and through the County of Wayne and State of Michigan; that there is diversity of citizenship in this matter.

2. That the amount in controversy herein is well in excess of the sum of Ten Thousand and no/100 ($10,000.00) Dollars, exclusive of interest and costs.

3. That on June 16, 1961, at about 4:30 P.M., Middlebelt Road was a four-lane paved through highway, consisting of two lanes of motor vehicular traffic in each direction, running in a generally north and south direction, at and near its intersection with the tracks of the defendant in the County of Wayne, City of Livonia and State of Michigan.

4. That on the date and at the time aforesaid the defendant was in control of and using certain railroad tracks running in a generally east and west direction, which intersected with the said Middlebelt Road between Schoolcraft and Plymouth Roads, consisting of five (5) railroad tracks which were on a rise higher than the intersecting road; that said railroad crossing was provided with light signals and gates, and was then and there under the control of the defendant; that the track on which this tragedy occurred was straight and level for some miles west of this crossing.

5. That at the time and place aforesaid the said minor's mother, Lois Jane Zatek, was driving a 1958 Chevrolet station wagon bearing Michigan 1961 license plates num-

bered DC 2917 in a southerly direction on the said Middlebelt Road, accompanied by three of her minor children; that she was unfamiliar with the operation of motor vehicles, as to their mechanical aspects; that the said minor was one of the passengers in said station wagon at that time.

6. That at that time the railroad crossing described above was near a busy racetrack then in operation, as well as crowded office buildings, homes and many places of business, and that there was heavy and congested motor traffic in the neighborhood of said crossing as a result thereof, and particularly because of the time of and day of the week.

7. That the defendant had been for a long time prior to the accident operating passenger and freight trains over the tracks and the crossing involved in the instant cause, so that the defendant corporation knew full well, during all of that time, of the dangerous and crowded character of the crossing.

8. That at the time and place described above, and for some distance west from the said crossing, the defendant, by its agents, servants and employees in its behalf, was in charge of and operated on said tracks, a certain high-speed railroad freight train, propelled by three diesel locomotives, in an easterly direction.

9. That on the date and at the time aforesaid, while Lois Jane Zatek was driving her said station wagon upon the said Middlebelt Road, in the exercise of due care and caution, she drove her said vehicle onto the tracks then controlled by the defendant, and while crossing the same, having lawfully and properly entered thereupon, without any previous warning, the roadway gates suddenly descended, accompanied simultaneously by ringing bells and the flashing of lights, placing Lois Jane Zatek in a position of extreme hazard, danger and frightful peril; that her station wagon then and there became and was stalled and disabled on the railroad tracks, and that this occurred during full daylight in clear weather, when visibility was good.

10. That said train then and there was so negligently, carelessly, recklessly, thoughtlessly and heedlessly operated for and on behalf of defendant company that, as a consequence thereof, it crashed into the stopped, disabled station wagon driven by Lois Jane Zatek, at a high rate of speed, demolishing said vehicle and thereby killing her, and causing the injuries alleged herein.

11. That the defendant was guilty of carelessness and negligence, as well as reckless and wanton misconduct toward the said minor at the time of the happening of the crash hereinbefore complained of in the following particulars, to-wit:

a) In propelling the locomotives and freight train over the crossing at an unreasonable and excessive rate of speed, to-wit: 65 miles per hour, especially in view of the conditions then existing at the crossing, which conditions were known to the defendant, or in the exercise of reasonable care should have been known to the defendant, so that said train could not be stopped within the assured clear distance ahead and thus avoid injuring said minor.

b) In failing to slow down or bring the said locomotives and train to a stop before crashing into the stalled station wagon driven by Lois Jane Zatek, when in the exercise of reasonable care, the said locomotives and train could have been slowed down or stopped before crashing into the vehicle driven by her.

c) In negligently failing to have adequate and proper brakes, hoses, devices, coupling systems, gauges and other equipment installed on said locomotives and train, failing to test, maintain and repair the same so that they would be in proper working order, couple a sufficient number of cars, or to use the same in time to avoid death or injury to that minor.

d) In carelessly hiring incompetent agents and operators to drive and propel said locomotives and

train, after the defendant knew, or in the exercise of reasonable care, should have known, thereof.

e) In failing to take such extra safety precautions as would be compatible with the dangerous and hazardous nature of said crossing, including the stationing of a crossing guard, and such other measures as would reasonably have avoided the injuries to the minor, in view of the hazardous condition then and there existing at said crossing, which defendant had the opportunity, means and ability to do.

f) In recklessly and negligently failing to exercise the high degree of care commensurate with the extremely hazardous and dangerous instrumentality then and there under the control of the said defendant, to-wit: a high-speed train.

g) In failing to avoid crashing into the vehicle driven by Lois Jane Zatek after the defendant had a reasonable opportunity and means to avoid the same by the exercise of reasonable care in discovering the vehicle's clearly observable position of peril.

h) In operating its said locomotives and train without due and proper regard to the congested traffic conditions then and there existing.

i) In recklessly and carelessly maintaining, setting and adjusting the timing pattern of gates, lights and bells, at said crossing, so that their faulty operating sequence caused them to constitute a dangerous trap, luring the vehicle onto defendant's tracks as if the crossing was a place of safety, and then suddenly causing the gates to be precipitously dropped in front of and behind her, creating panic and causing the station wagon to stall as a result thereof.

j) In negligently and recklessly failing to continuously keep a sharp and careful lookout, or make reasonably careful observations, which would have revealed the presence of Lois Jane Zatek's station wagon

helplessly disabled on the crossing in broad daylight where it could plainly be seen, or in carelessly failing to take reasonably prudent measures to avert the collision after discovering it there.

k) In wilfully, recklessly and wantonly failing to take all possible measures to avoid a collision with Lois Jane Zatek's station wagon after its peril had been discovered by defendant's agents, servants and employees.

l) In negligently failing to maintain the grade at said crossing, so that its tracks were not flush with the road surface, thereby occasioning Lois Jane Zatek's motor vehicle to stall.

m) In failing to warn Lois Jane Zatek of imminent danger by the sounding of gongs, horns, whistles, bells or other adequate means, other than the usual and customary signals sounded upon approach to a crossing of defendant's train.

12. That on and before the date alleged above, this minor plaintiff was a healthy, active and able-bodied child of .. years of age, with a life expectancy, under M.S.A. 24.1834 of 52.117 years, and an even longer probable expectancy under the Commissioner's 1958 Standard Ordinary Mortality Table; that his next of kin are his father, John Zatek, and sisters, Mary Alma Zatek, age 10, and Anna Katryn Zatek, age 9.

13. That as a direct and proximate result of the negligence and recklessness of the defendant, as aforesaid, Richard Paul Zatek was seriously injured in his head, face, left shoulder, arm and forearm, right shoulder, and right leg, as well as other portions of his body, sustaining permanent injuries, and severe and excruciating pain and suffering; and that he was forcibly thrown out of the vehicle in which he was a passenger, striking the ground and suffering a cerebral concussion, and suffered shock to his central nervous system, great pain, soreness and discom-

fort; abrasions, contusions, bruises and lacerations with tearing, avulsion, sprain and wrenching of his muscles, accompanied by bleeding, tearing of blood vessels, ligaments, tendons, muscles and soft tissues, fractures, and also suffered headaches and other discomfort; that his injuries are permanent, to the extent that he will never be the same as before this collision, and that he suffered pain in the past, and now is in pain and discomfort which will probably last for the remainder of his life.

14. That as a further consequence of the negligence and recklessness of the defendant as heretofore alleged, the minor plaintiff required ambulance, emergency first-aid, X-ray, hospital and other medical services, that he is still undergoing medical treatment, and may have to continue such treatment for the remainder of his life.

15. That as a direct and proximate result of the negligence and recklessness of the defendant, the minor plaintiff and his estate expended or became liable for great sums of money for ambulance, emergency first-aid, doctors, hospitals, medicines, X-rays and nursing, as well as divers other sums, in and about seeking treatment and amelioration of his said injuries, together with damage to his personal effects; that he has been further damaged in his enjoyment and ability to partake in recreational pursuits, earn a livelihood in the future, and otherwise secure the benefits of a healthy and able-bodied child in his tender years, both presently and in the future.

16. That the plaintiff herein claims exemplary and punitive damages because of the reckless, wilful and wanton nature of the actions of the defendant, by and through its servants and agents in its behalf, in the happening of this tragic occurrence.

Wherefore, plaintiff claims judgment against the defendant for compensatory and exemplary damages in the sum of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars, plus costs and attorney fees.

COUNT II

Plaintiff re-alleges and adopts by reference thereto all of the allegations contained in paragraphs one through sixteen of Count I as though specifically repeated at length herein, as paragraphs one through sixteen of Count II, except for paragraph eleven.

17. That if Lois Jane Zatek was herself negligent in some manner preceding the collision complained of herein which placed her in a position of peril, nevertheless any such negligence on her part ceased to operate as a contributing factor to the occurrence, and the defendant was then and there further negligent and reckless in not then using reasonable care in slackening the speed of said train, or stopping it in time to avoid death or injury to plaintiff, after defendant knew, or in the exercise of reasonable care should have known, that her vehicle was helpless and in a position of inextricable peril, and when the defendant had the time, means, opportunity and ability to do so.

Wherefore, plaintiff claims judgment against the defendant in the sum of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars, plus costs and attorney fees.

Cassese, Batchelder, Jasmer & Evanski,
Attorneys for Plaintiff,
550 Guardian Building,
Detroit 26, Michigan.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE LUDWIG, as guardian of the Estate of Richard Paul Zatek, a minor, Plaintiff. v. THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a foreign corporation, Defendant.	Civil Action No. 21,997

AMENDED COMPLAINT

(Filed March 7, 1962)

(Specimen of all Cases)

Now comes Eugene Ludwig, as guardian of the Estate of Richard Paul Zatek, a minor, by Cassese, Batchelder, Jasmer & Evanski, his attorneys, states as follows:

COUNT I

1. That he is the duly qualified and acting guardian of the Estate of Richard Paul Zatek, a minor, having been appointed by the Probate Court for the County of Wayne, State of Michigan; that he is a resident and citizen of St. Clair Shores, County of Macomb and State of Michigan; that the defendant is a railroad corporation organized and existing under the laws of a foreign state, and not a citizen of Michigan, with railroad tracks running into and through the County of Wayne and State of Michigan; that there is diversity of citizenship in this matter.

2. through 14. Plaintiff realleges and adopts by reference thereto, all of the allegations contained in paragraphs two through fourteen of Count I, as though spe-

cifically repeated verbatim at length herein, as paragraphs two through fourteen of Count I of this, his Amended Complaint.

15. That as a further result of the negligence and recklessness of the defendant as aforesaid, the minor plaintiff herein suffered emotional impairment and personality disturbances; that his capacity to earn a living has been substantially and permanently impaired; that his ability to engage in normal social and recreational pursuits and activities has been substantially and permanently diminished.

16. That the plaintiff herein claims exemplary and punitive damages because of the reckless, wilful and wanton nature of the actions of the defendant, by and through its servants and agents in its behalf in the happening of this tragic occurrence.

Wherefore, plaintiff claims judgment against the defendant for compensatory and exemplary damages in the sum of One Hundred Fifty Thousand and no/100 ($150,000.00) Dollars, plus costs and attorney fees.

COUNT II

Plaintiff realleges and adopts by references thereto all of the allegations contained in paragraphs one through sixteen of Count I as though specifically repeated at length herein, as paragraphs one through sixteen of Count II, except for paragraph 11.

17. That if Lois Jane Zatek was herself negligent in some manner preceding the collision complained of herein which placed her in a position of peril, nevertheless any such negligence on her part ceased to operate as a contributing factor to the occurrence, and the defendant was then and there further negligent and reckless in not then using reasonable care in slackening the speed of said train, or stopping it in time to avoid death or injury to plaintiff,

after defendant knew, or in the exercise of reasonable care should have known, that her vehicle was helpless and in a position of inextricable peril, and when the defendant had the time, means, opportunity and ability to do so.

Wherefore, plaintiff claims judgment against the defendant in the sum of One Hundred Fifty Thousand and no/100 ($150,000.00) Dollars, plus costs and attorney fees.

Cassese, Batchelder, Jasmer & Evanski,
By Frederick D. Jasmer,
Attorneys for Plaintiff,
550 Guardian Building,
Detroit 26, Michigan.

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * * * *

JEROME FINE—*Direct*

* * * * *

Q. (98) And what is the next thing that you remember happening?

A. I saw her stalled out there and I was figuring what she was trying to do. Then I seen her trying to start the car.

* * * * *

GERALD SCHLAFF—*Direct*

* * * * *

(127) Q. Now, when you pulled up to the crossing, what did you see?

A. A car was stalled on the tracks.

* * * * *

JOSEPH B. EVANSKI—*Direct*

* * * * *

(149) Q. Ending up with the type of freight in each car, what answer was made to that interrogatory?

A. 'Answering Interrogatory Number A1, deponent says that the train involved was designated as Train Number 52. Answering Interrogatory Number A2, deponent says that the train was comprised of 79 cars and a caboose. Answering Interrogatory Number A3, a, b, c, d, and e, deponent says that he has attached hereto the only information defendant has covering the subject of the inquiry."

* * * * * *

Q. Under the same heading F. Weight of each locomotive at time of impact.

(157) A. 5958—255,700; 6144—255,550; 5781—254,500 pounds.

* * * * *

ARTHUR SIMPSON— *Direct*

* * * * *

(523) Q. Let me amend that section of the question as follows, that there were 61 loaded cars weighing 3,296 tons, assume 18 empties at 434 tons, a caboose at 23 tons and three locomotives totaling 383 tons.

A. Yes, sir.

* * * * *

(577) Q. (By Mr. Jasmer, continuing): If the brake valve at this 60 miles an hour train, under the conditions just mentioned to you, is applied after 7.25 seconds, would there be less violence than if the train struck that car under the conditions where the valve had been applied at a point three car lengths east of the whistle post?

A. Yes, there would be.

Q. Can you explain that, how would that work?

A. Well, I can explain it by pointing out that if the brakes were applied 7¼ seconds after the engine crossed the insulating rail joint, the train was traveling at 60 miles

an hour, that is 88 feet a second, would have traveled 638 feet beyond the rail joint or the engine would be 2,380 feet west of Middle Belt at that time.

The Court: Wait a minute, at which time the engine would be how far from Middle Belt?

A. 2,380 feet west of Middle Belt at the time the brakes were applied.

The Court: All right.

A. That train with the emergency brakes applied at that point would be traveling very close to 40 miles an hour at Middle Belt.

* * * * * *

A. And the 62.8 miles per hour?

Q. Yes, if the emergency brakes were applied at that point, how fast was the train going when it hit the car?

A. Well, I will have to look it up. Excuse me, I will have to take a little time to check this. A train traveling at 62.8 miles per hour with the brake applied 1,185 feet west of the crossing—

Q. Yes.

A. Would be traveling approximately 55 miles per hour at the (579) crossing.

* * * * * *

No. 992

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IN THE

Supreme Court of the United States

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a Foreign Corporation,
Petitioner,

vs.

EUGENE LUDWIG, as Guardian of the Estate of
Richard Paul Zatek, a minor, Cause No. 21997;
TERESA SERRATONI, as Administratrix of the Estate of
Joan Ellen Zatek, Deceased, Cause No. 21998;
TERESA SERRATONI, as Administratrix of the Estate of
John Michael Zatek, Deceased, Cause No. 21999;
JOHN ZATEK and WOLVERINE INSURANCE CO.,
a Michigan Corporation, as Subrogee of
John Zatek, Cause No. 22025,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS INVOLVED

I.

Where on a second appeal based upon exactly the same evidence as was considered in the first appeal, petitioner again raises the same contentions which it had the full op-

portunity to and did urge on the first appeal, both in the Court of Appeals and here (Cert. den. 379 U. S. 960), is this Court obliged to again consider the same contentions a second time, in view of the doctrine of the Law of the Case?

II.

Where no constitutional rights were involved in the Court of Appeals' decision which contained *dicta* taking judicial notice of a commonly accepted fact which was not decisive of the case, and that decision did not conflict with any other decisions of this Court or any other Court of Appeals, and was in harmony with governing Michigan law as well, certiorari should be denied.

COUNTER-STATEMENT OF FACTS

This case was before this Court previously following the first appeal to the Circuit Court of Appeals. At that time the railroad petitioned this Court to grant Certiorari and filed an extensive brief in support thereof.

The first four points raised in the Petition for Certiorari filed by the railroad on the previous appeal contained exactly the same questions, although phrased in different words, as are being urged again in the present Petition. That Petition was denied by this Court at 379 U.S. 960.

The fact that the same questions were raised in this Court previously, or even the fact that this Court was asked to grant Certiorari previously, is nowhere mentioned in the Petition or Brief of the railroad.

Because of the lengthy, distorted and over-burdened presentation of alleged "facts" urged by the railroad, respondents are compelled to point out some salient factual matters. The tragic collision in this matter occurred in

June of 1961 and full trial to a jury was had during the summer of 1962, the trial lasting some 3½ weeks.

Following verdict in favor of plaintiff-passengers and one in favor of the railroad as to the driver, the trial court erroneously granted a motion N. O. V.

On the first appeal, the Court of Appeals made an exhaustive study of the proceedings, carefully considered the evidence, and ordered the verdicts favoring the passengers reinstated in a well reasoned decision. 333 F. 2nd 621 (1964).

Following the decision of the Court of Appeals, the railroad filed a Petition for Rehearing before the Court *en banc*. That Petition raised all of the points which are now urged by the railroad here for the second time, and sought to claim that the railroad had not had a fair trial because of the fact that judicial notice had been taken of a commonly accepted fact by the Court of Appeals. That Petition was denied.

Following the denial of said Petition, the railroad addressed itself to this Court, asking this tribunal to grant Certiorari. In its Petition at that time, the railroad raised seven separate questions, the first four of which objected to the taking of judicial notice as being some fancied deprivation of constitutional rights. The *same* grounds which are urged now were presented to this Court at that time. Certiorari was denied by this Court.

Because of delays due to the mechanics of the appellate procedure on the first appeal, the Mandate from the Court of Appeals was not sent to the District Court in Detroit until March of 1965. After it was received there, the railroad brought several dilatory motions in the trial court and, finally, a Judgment was entered on the verdicts on April 19, 1965.

Defendant railroad then laid back until the next-to-last day for filing its motion for a new trial, then filed the same and initiated the proceedings leading to this *second* request for Certiorari.

This second appeal has come before this Court because of the railroad's objections to the ruling of the trial court in denying its motion for new trials, another salient fact which is not mentioned by the railroad in its brief here. As this Court well knows without citation of authority, the decision of the trial court on such motion is entirely discretionary.

In its brief on appeal to the Court of Appeals, and in this, the second appeal, the railroad presented the same contentions regarding judicial notice and alleged deprivation of constitutional rights as are contained in its present Petition for Certiorari.

The District Court had made mention, during argument after the first appeal, that it was obvious that the railroad was guilty of deliberate delay and attempting to string the case out to the very last moment. This was pointed out by respondents in their brief to the Court of Appeals and a motion to advance the hearing of the second appeal was made in that Court. This motion was granted by the Court of Appeals and oral argument was heard December 1, 1965.

On December 10, 1965, the Court of Appeals issued its order expressly approving the well-considered opinion of the trial judge in denying the motion for a new trial.

Each and every point now urged for the second time by the railroad was previously urged upon this Court, the Court of Appeals and the trial court.

ARGUMENT

I.

Where on a second appeal based upon exactly the same evidence as was considered in the first appeal, petitioner again raises the same contentions which it had the full opportunity to and did urge on the first appeal, both in the Court of Appeals and here (Cert. den. 379 U. S. 960), is this Court obliged to again consider the same contentions a second time, in view of the doctrine of the Law of the Case?

It was pointed out by your respondents to the Court of Appeals that many of the points urged on this second appeal had been argued previously, and the Court agreed that it was not obligated to reconsider its previous decision over again, asking counsel for the railroad during oral argument to go on to new material which the railroad had not previously presented. This occurred when counsel for the railroad attempted to place before the Court of Appeals for the second time all of the burdensome minutiae of the details of the accident. The Appellate Court was correct in doing this because these same matters had been urged there before, considered and disposed of.

They have also been argued here before, and are now being pressed upon this Court for the second time.

For the sake of expediency and economy, respondents respectfully pray reference to the earlier briefs in these cases, both in this Court and below, where these matters are specifically pointed out.

The doctrine of "The Law of the Case" encompasses all legal issues which might have been raised upon the former appeal as well as those which actually were raised. In the

case at bar, there was no second trial ordered or had, so that there are no new facts which were not presented or could not have been presented when these cases were tried to the jury.

The Law of the Case rule applies even more strongly in a case, such as this, where not only the opportunity was presented for petitioner railroad to raise the points it is now seeking to make again, but it actually did raise them in its previous Petition for Certiorari.

As is said by the editors of American Jurisprudence:

> "* * * It is generally held that on questions determined by an intermediate Appellate Court, its decision constitutes the Law of the Case after the judgment becomes final if the party seeking the second appeal failed to challenge the prior determination of the intermediate Appellate Court in the Court of last resort, in other words, if the decision of the Appellate Court was appealable, but no appeal was taken from it, or if the higher Appellate Court confirmed, or refused to review the prior determination of the intermediate Appellate Court."
>
> *5 Am Jur 2d,* Appeal and Error, 191.

Although this Court, in denying Certiorari the first time, and the Court of Appeals in denying the Petition for Rehearing following the earlier appeal, did not write opinions setting forth their grounds for finding no merit in these contentions of the railroad, the decisions are conclusive and it must be noted that the railroad has already had its full opportunity to raise all of these points and has already presented them. The Court of Appeals, the trial court, and, as a matter of fact, this Court, have previously considered these claims and found them to be without merit.

The "law of the case" has similarities with *res adjudicata.* It is a necessary doctrine and must be applied peremptorily where a stubborn, losing litigant seeks to cause delays. Any deviation from that principle would result in endless litigation, long deferments, needless expenses and postponement of finality. The Court is not required to repeatedly listen, through these second appeals, to criticism of its earlier decisions and opinions in the case. *General Am. Life Ins. Co. v. Anderson,* 156 F 2nd 615 (C. A. 6); *Hildreth v. Union News Company,* 315 F. 2nd 548 (C. A. 6).

5 Am. Jur. 2nd, Section 744, states that the term "law of the case" is also sometimes used more broadly to indicate the principle that a decision of the appellate court, unless properly set aside, is controlling at all subsequent stages of the litigation, which includes the rule that on remand the trial court must strictly follow the mandate of the appellate court.

After the Circuit Court of Appeals' Mandate to the trial court, petitioner embarked on another series of motions at the trial court level. The trial court found the railroad guilty of "deliberate delay" in drawing out these proceedings. The point was made by your respondents in the Court of Appeals that the present second appeal was instituted merely for the purpose of retardment, to cause respondents further unnecessary expense, and was in fact wholly without merit.

In fact, upon the argument of this second appeal in the Court of Appeals, the Court directed counsel for petitioner railroad to state petitioner's reasons why a penalty should not be imposed upon the railroad for delay and vexation in these appeals, and quite properly refused to allow the railroad to re-argue the same points which it had argued before, since those matters had already been considered and decided. The same principles apply here.

II.

Where no constitutional rights were involved in the Court of Appeals' decision which contained *dicta* taking judicial notice of a commonly accepted fact which was not decisive of the case, and that decision did not conflict with any other decisions of this Court or any other Court of Appeals, and was in harmony with governing Michigan law as well, certiorari should be denied.

Turning to the merit, if any, in the contentions of petitioner railroad that it did not have its day in Court, it must be pointed out that the contentions presented upon this second request for certiorari were all answered in the earlier brief of respondents to the similar Petition in this Court in 1964.

It was there pointed out that the complaints regarding the taking of judicial notice by the Court of Appeals were entirely specious, since the Court of Appeals had a perfect right to take notice of a commonly accepted fact.

Moreover, petitioner claimed then, as it does again now, upon this successive appeal, that it had no opportunity to present evidence on the movability of the stalled car. Respondents furnished this Court with a transcript of testimony at the trial showing that this subject had indeed been gone into and that the railroad had every opportunity to bring in its evidence on this point. It offered none.

It was further shown that the decision of the Court of Appeals upon the former appeal was actually a vindication of the right to trial by jury, reinstating as it did the verdict of the jury after 3½ weeks of trial, in which the railroad had had every opportunity to bring forth whatever evidence it wished concerning this occurrence.

It was also pointed out in the brief of respondents in opposition to the first Petition for Writ of Certiorari that

the mention in the Court of Appeals' decision of the fact of which it took judicial notice constituted nothing more than *dictum* and that the decision did not turn upon that point. As a matter of fact, in that portion of the decision, the Court of Appeals was discussing the fact that the automobile might have been started along with several other possible beneficial effects which could have occurred if the railroad's train crew had applied their brakes as promptly as they should have in the exercise of reasonable care.

It was also pointed out by respondents in the former appeal that the Court of Appeals' decision was in harmony with Michigan law and did not conflict with the decisions of any other Courts of Appeal, and that in fact there was absolutely no constitutional or other pressing public question involved in this case. Nor is there any now.

The petitioner railroad failed to show this Court any decisions from any Court of Appeals or other Court conflicting in any way with the decision of the Court of Appeals in this case, and in addition the railroad has failed on this second appeal to show any such conflict, either. This application for Certiorari is without merit and wholly redundant.

CONCLUSION

In view of the fact that the matters complained of by petitioner railroad in its request for Certiorari have all been raised in this Court before, upon a previous request for Certiorari upon the former appeal, and in view of the fact that no constitutional or public questions of any kind are involved, the Petition for a Writ of Certiorari should be denied again.

Respectfully submitted,

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IN THE

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OCTOBER TERM 1965

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Respondents

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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At the outset, your Petitioner wants to call the Court's attention to the case of *Herbert Heider, Adm., et al., Petitioner v. Michigan Sugar Co., Respondent,* Docket No. 869, in which this Court recently granted certiorari in a case parallel to the instant case. In *Heider, supra,* Respondent had appealed to the Supreme Court of Michigan from judgments entered by the Trial Court in favor of Petitioner.

In that case, Respondents raised, for the first time on appeal, a defense to the actions based upon a statute of the State of Michigan which had not been pleaded or relied upon in the Trial Court and Petitioner had not, therefore, been apprised of this defense and, of course, had introduced no proofs as to the applicability of the statute. The Supreme Court of Michigan reversed judgments in favor of Petitioner and entered final judgment in favor of Respondent. From the judgment of the Supreme Court of Michigan, Petitioner filed with this Court its Petition for Writ of Certiorari, claiming that Petitioner's constitutional rights had been violated on the grounds that it had no opportunity to present evidence or offer pleadings in the Trial Court on the defense first raised in the Supreme Court, and that Respondent had changed its legal position at the appellate level. This Court granted certiorari.

The instant case is parallel to the *Heider* case *supra*. In *Heider* Petitioner was deprived, at the trial level, of his right to be apprised of the theory of defense which ultimately prevailed and Petitioner was therefore deprived of the opportunity, at the trial level, to present facts to contest the applicability of the statute and was also deprived of the opportunity to have the jury determine from the facts whether or not the statute was a defense to the action. In the instant case, Petitioner was deprived, at the trial level, of its right to be apprised of the facts relied upon to sustain the jury verdicts since these facts were judicially noticed by the Court of Appeals and therefore Petitioner had no opportunity to dispute the facts thus judicially noticed. Petitioner was also deprived of its right to have the facts judicially noticed presented to the jury for the jury's consideration in determining the ultimate rights of the litigants. In the instant case, the Petitioner was also deprived, at the trial level, of its right to be ap-

prised of the theories of recovery which were asserted by the Court of Appeals to sustain the jury verdicts since these theories were first advanced in the decision of the Court of Appeals. This action also deprived Petitioner of its right to have the theories of recovery advanced by the Court of Appeals submitted to the jury for the jury's determination of whether or not liability should attach under the theories advanced.

Turning now to Respondents' brief in opposition to petition for writ of certiorari in the instant case the gist of it can be fairly summarized as follows:

1. The matters raised by Petitioner in its petition for writ of certiorari have previously been decided by this Court contrary to Petitioner's position.
2. The facts judicially noticed by the Court of Appeals were not essential to its decision, but if they were essential to the decision, the facts were properly noticed since they were commonly accepted facts which could be noticed by the Court of Appeals.
3. The denial of a motion for new trial is discretionary with the Trial Court. Therefore, this Court cannot review the matters raised in the motion for new trial even if erroneously decided.
4. Petitioner had ample opportunity in the Trial Court to introduce proofs contesting the theories of recovery advanced by the Court of Appeals to sustain the jury verdicts even though those theories of recovery were not advanced by Respondents in the Trial Court and were not submitted to the jury for determination.
5. Counsel for Petitioner deliberately delayed the ultimate outcome of these cases; therefore this Court should not grant the Petition.

It is Petitioner's belief that the above described matters fairly represent the position taken Respondents in opposition to the petition and will answer them seriatim.

1. It is true, as Respondents assert, that following the decision of the Court of Appeals in setting aside judgments in favor of Petitioner and reinstating jury verdicts in favor of Respondents, Petitioner filed a petition for writ of certiorari in the October Term, 1964, under Docket No. 551. In that petition Petitioner pointed out at the outset that the final judgments had not been entered against Petitioner nor had Petitioner exercised its right to file a motion for new trial under the applicable Federal Rules of Civil Procedure. That petition was denied. Thereafter Petitioner filed its motion fer new trial in the District Court, which motion was denied and from final judgments entered, Petitioner, filed an appeal to the United States Court of Appeals for the Sixth Circuit, raising in its brief the constitutional issues which it presents in the instant petition. These same issues were raised in Petitioner's Petition for Rehearing *In Banc* filed with the Court of Appeals following receipt of the decision of the Court of Appeals on Respondents' appeal. As pointed out by Respondents in their brief in opposition the Court of Appeals directed Petitioner not to argue the the issues raised in the instant petition ostensibly on the grounds that this Court had denied Petitioner's first petition raising these points and therefore the matter was finally decided adversely to Petitioner. This is the same position taken by Respondents in the instant petition.

That a denial of petition for writ of of certiorari is not a determination on the merits of the matters raised in the Petition is clearly set forth by this Court in *Atlantic Coast*

Line R. Co. v. Powe, 283 U.S. 401, where the Court said, at page 403, 404:

> "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

It is equally clear that the mere fact that this Court denied Petitioner's earlier petition does not foreclose this Court from entertaining this case on the merits at this time. In *Hamilton-Brown Shoe Co. v. Wolfe Brothers & Co.,* 240 U.S. 251, this Court said, at pages 257, 258:

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the Circuit Court of Appeals on the first appeal and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the Court of Appeals upon the Second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari under §240, Jud. Code, derived from §6 of the Evarts Act of March 3, 1891, 26 stat. 826, 828, ch. 517. As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. * * * And, except in extraordinary cases, the writ is not issued until final decree. * * * The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application; besides which it appears, by reference to our files, that the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of

public interest and general importance, nor any conflict between the decisions of state and Federal courts, or between those of Federal courts of different circuits.

"It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

In the instant case, therefore, since final judgments have been rendered against Petitioner, this petition is properly before this Court and raises constitutional isseus of importance to the trial of all lawsuits, which issues were properly raised below even though Petitioner was foreclosed from arguing them.

2. Respondents desperately attempt to convince this Court that when the Court of Appeals judicially noticed "that a modern automobile can be started and moved its own length in a few seconds" and also "that any movement of the train—even if insufficient to have prevented impact—could have changed substantially both the nature of the accident and the nature of the injuries suffered therefrom," it meant nothing by these pronouncements even though in the very next paragraph of the decision it refers to the judicially noticed facts and rejects the District Court's Opinion, based upon the record pre-

sented in the District Court, that there was no negligence on the part of Petitioner. The facts which were judicially noticed were the *sine qua non* to support the theories of recovery advanced by the Court of Appeals in order to support the jury verdicts.

To be specific, the decision of the Court of Appeals would permit the jury to find Petitioner negligent for failing to make an earlier application of the brakes on its train on the theory that an earlier application of the brakes would have afforded a few seconds more time before the moment of impact and in this period of time Respondents' driver could have started and moved the automobile and, if so, the accident or results thereof may have been different. Under this theory it is essential to show that the automobile could have started and moved in the undisclosed additional time which might have been afforded if there had been an earlier application of the brakes. As pointed out in the petition, there was absolutely no proof that Respondent's automobile could have been started and moved regardless of any additional time which may have been afforded. On the contrary, Respondents had pleaded that the auto was stalled, helplessly disabled, and in a position of inextricable peril and introduced proof to support these allegations. In addition, Respondents introduced proof that the driver of the car had ceased her efforts to move the car some seconds before the impact. Therefore, contrary to the pleadings and proof, and in order to supply this lack of proof the Court of Appeals took judicial notice that a modern automobile can be started and moved in a very few seconds and thereafter inferred that Respondent's automobile could have been started and moved in a very few seconds. This inference was drawn by the Court of Appeals and not by the jury since the jury

was not instructed by the District Court nor did Respondents request the jury to be instructed to permit a recovery on this theory.

Secondly, and in the alternative, in the event the automobile could not have been started and moved the Court of Appeals would permit the jury to find Petitioner negligent on the grounds that an earlier application of the brakes would have slowed the train somewhat and that a slower impact force (which on the record would be 40 miles per hour rather than 55 miles per hour) would have resulted in less fatal and severe injuries. There was absolutely no proof that a lessened impact force would have resulted in less fatal or less severe results. In order to supply proof to support this latter conclusion the Court of Appeals took judicial notice that "lessened force" could have prevented the deaths or injuries complained of. This conclusion was reached solely by the Court of Appeals since the District Court did not instruct the jury that it could find Petitioner negligent for failinng to slow its train on the grounds that the deaths and injuries could have been lessened or avoided; nor did Respondents request that the jury be so instructed. Neither the judicially noticed facts nor the theories herein referred to were submitted to the jury for the jury's determination of whether or not liability should attach under the facts and theories advanced by the Court of Appeals. Since neither the facts nor the theories were presented in the District Court, Petitioner did not offer proof nor was it required to offer proof in opposition.

Also contrary to Respondent's position, that is, that the facts judicially noticed by the Court of Appeals were immaterial, is the District Court's decision on Petitioner's Motion for a New Trial. The District Court clearly recog-

nized that the facts judicially noticed supported the theory of recovery advanced by the Court of Appeals for in commenting on the reasoning of the Court of Appeals the Court stated (App. 42):

> "If the car could get off the tracks, the defendant might well be found negligent for failure to slow up in order to give the car more time to get off the track. And if the car could not get off the track the defendant might well be found negligent for failure to slow up in order to lessen the impact, and therefore to reduce the seriousness of the accident."

The Court of Appeals adopted the District Court's opinion in affirming the judgments (Appendix "F," App. 55).

Respondents next argue that the facts judicially noticed were commonly accepted facts. While Petitioner does not dispute the fact that a modern automobile in proper mechanical condition being operated by a competent driver can be started and moved its own length in a very few seconds, it does dispute, however, the judicially noticed fact, that a second-hand three-year old automobile which had somehow stalled on Petitioner's track and was in a helpless, disabled condition and being operated by a novice driver unfamiliar with the mechanical aspects of automobiles could be started and moved in a very few seconds. This is especially true when it is undisputed that the driver had ceased trying to start the car in the last few seconds before the collision.

Petitioner also disputes the judicially noticed fact that a lesser impact speed would have substantially changed the nature of the injuries, for it does not agree that it is a commonly accepted fact that occupants of an automobile struck by a 4,136-ton train traveling 40 miles per hour are

apt to fare better than those struck by the same train at a speed of 55 miles per hour. In any event, however, if Petitioner is to be saddled with liability on a theory that a lower impact speed may have resulted in lesser injuries, it should have at least been apprised of this theory of recovery dur ing the trial of the case in order to permit Petitioner to introduce rebutting proofs and this theory of recovery should have been submitted to the jury for the jury's ultimate determination of whether or not Petitioner should respond in damages on this theory.

3. There is no question but what the District Court has a large measure of discretion in the granting or denying of motions for new trials. However, the discretion is limited to deciding where the weight of the evidence lies. The District Court does not have d scretion to decide matters of law improperly and it is the improper decision on matters of law to which this petition is directed.

4. Respondents take the position that Petitioner was not foreclosed during the trial of the cases from introducing proofs to contest the facts which were judicially noticed by the Court of Appeals even though the facts judicially noticed were not pertinent to any of the theories of recovery advanced in the District Court or submitted to the jury. If opposing counsel did not object, and if the District Court did not object, it is obvious that Petitioner could have introduced any proofs it desired on any point, whether pertinent or not to the issues raised in the District Court, but it would have been just as ridiculous for Petitioner to introduce proofs on issues not raised in the District Court in the instant case as it would have been for Petitioner to introduce proofs contesting the applicability of the statute involved in the *Heider* case, *supra*, when the statute had not been pleaded, introduced or relied upon as a defense during the trial of that case.

Specifically, where Respondents pleaded and proved that the automobile was stalled, helplessly disabled and in a position of inextricable peril on Petitioner's tracks, and Petitioner agreed with those facts during the trial, there seem to be little reason for Petitioner to introduce proof on this point, for Petitioner could hardly anticipate that under these circumstances the Court of Appeals would judicially notice that the automobile could have been started and moved if given some undisclosed additional time. It is also inconceivable that Petitioner would be required to introduce proofs that the speed of impact would not have changed the nature of the injuries when Respondents offered no proof on this point and the jury was not permitted to find that a lesser impact speed may have changed the nature of the injuries.

5. The trial of opposing counsel may be "fair game" by members of plaintiff's bar, but it hardly is a matter to be raised in the United States Supreme Court. Counsel for Respondents conveniently fail, in their brief in opposition, to apprise the Court that the matter of alleged dilatory tactics was urged upon the Court of Appeals and that Court summarily dismissed the matter and suggested, from the record of the proceedings, that Respondents had had an expeditious handling of their claims and that the time consumed in reaching that stage of litigation was no more than one would normally expect in any adversary proceeding.

CONCLUSION

For the reasons set forth herein and in its petition, and also in the interests of law and substantial justice, the Petition for Writ of Certiorari should be granted and the case remanded for a new trial.

Respectfully submitted,

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